No. 99-____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

CRYSTAL M. FERGUSON, *et al.*,

Petitioners,

—v.—

THE CITY OF CHARLESTON, SOUTH CAROLINA, *et al.*,

Respondents.

ON PETITION FOR A *WRIT OF CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR *WRIT OF CERTIORARI*

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PUBLISHED
UNITED STATES COURT OF APPEALS,
FOURTH CIRCUIT.
186 F.3d 469

Crystal M. FERGUSON; Paula S. Hale; Ellen L. Knight; Patricia R. Williams; Lori Griffin; Pamela Pear; Sandra Powell; Laverne Singleton; Theresa Joseph; Darlene M. Nicholson, Plaintiffs-Appellants,
and
State-Record Company, Incorporated; The Evening Post Publishing Company, Intervenors-Plaintiffs,
v.
CITY OF CHARLESTON, SOUTH CAROLINA; Dr. Harrison L. Peoples; Dr. Thomas C. Rowland, Jr.; Dr. Stanley C. Baker, Jr.; Dr. Charles B. Hanna; Dr. Cotesworth P. Fishburne; Dr. E. Conyers O'Bryan; Melvyn Berlinsky; Patricia T. Smith; M.J. Cooper; Herbert C. Granger; Robert C. Lake, Jr.; Phillip D. Sasser; Claudia W. Peoples; Dr. Carroll V. Bing, Jr., in their official capacities as Trustees of the Medical University of South Carolina; Reuben Greenberg; Charles Molony Condon; David Schwacke; Shirley Brown, R.N.; Edgar O. Horger, III, M.D.; Victor Del Bene; John Sanders; William B. Pittard, M.D.; Roger Newman, M.D.; Harold Bivins, M.D.; Melesia Henry, R.N., personally and in their official capacities, Defendants-Appellees.

Center For Constitutional Rights, Amicus Curiae.

No. 97-2512

Appeal from the United States District Court for the District of South Carolina, at Charleston.
C. Weston Houck, Chief District Judge.
(CA-93-2624-2-12)

Argued: Oct. 26, 1998.

Decided: July 13, 1999.

Before WILKINS and NIEMEYER, Circuit Judges, and BLAKE, United States District Judge for the District of Maryland, sitting by designation.

Affirmed by published opinion. Judge WILKINS wrote the majority opinion, in which Judge NIEMEYER joined. Judge BLAKE wrote an opinion dissenting in part.
Affirmed.

Blake, J., filed opinion dissenting in part.

COUNSEL

ARGUED: Priscilla Joyce Smith, Center for Reproductive Law & Policy, New York, New York, for Appellants. Barbara Wynne Showers, Joseph Camden Wilson, IV, Hood Law Firm, L.L.C., Charleston, South Carolina, for Appellees. ON BRIEF: Susan K. Dunn, Charleston, South Carolina, for Appellants. Robert H. Hood, Hood Law Firm, L.L.C., Charleston, South Carolina, for Appellees. Kimani Paul-Emile, Barbara Olshansky, Center for Constitutional Rights, New York, New York, for Amicus Curiae.

OPINION

WILKINS, Circuit Judge:

This litigation involves constitutional, statutory, and common-law challenges to a policy instituted by the Medical University of South Carolina (MUSC) in consultation with the Solicitor of the Ninth Judicial Circuit of South Carolina; the City of Charleston, South Carolina Police Department (CCPD); and various social services agencies. The policy was intended to encourage pregnant women whose urine tested positive for cocaine use to obtain substance abuse counseling. Appellants, ten women who were tested pursuant to the policy, brought this action claiming, inter alia, that the testing of their urine for evidence of cocaine use constituted a warrantless search in violation of the Fourth Amendment; that the policy had a racially disparate impact in violation of regulations implementing Title VI of the Civil Rights

Act of 1964, as amended, 42 U.S.C.A. §§ 2000d to 2000d-6 (West 1994 & Supp. 1998); that the disclosure of medical information to law enforcement personnel violated their constitutional right to privacy; and that MUSC personnel committed the state-law tort of abuse of process in administering the policy. The district court entered judgment for Appellees[1] on each of these claims at various stages of the litigation. For the reasons set forth below, we affirm.

I.

In the fall of 1989, MUSC instituted a policy providing for the testing of the urine of pregnant women suspected of cocaine use and for the reporting, under certain circumstances, of test results to law enforcement officials. The impetus behind the policy came from Nurse Shirley Brown, a case manager in the obstetrics department at MUSC. Brown was concerned about a perceived rise in cocaine use among pregnant women and the consequences for the health of the users' children. Brown spoke with the General Counsel for MUSC who in turn contacted the Ninth Circuit Solicitor (chief prosecuting attorney) concerning the development of a policy to address the problem. Eventually, a task force was formed that included Nurse Brown, the Solicitor, the Chief of CCPD, and doctors from various departments involved in perinatal care at MUSC. During the course of task force meetings, the Solicitor informed the participants that because a viable fetus was a "person" under South Carolina law, a woman who ingested cocaine after the 24th week of pregnancy was guilty of the crime of distributing a controlled substance to a person under the age of eighteen, see S.C. Code Ann. § 44-53-440

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[1]The complaint filed by Appellants named as defendants the City of Charleston, South Carolina; the trustees of MUSC; CCPD Chief Reuben Greenberg; former Ninth Circuit Solicitor Charles Condon; current Ninth Circuit Solicitor David Schwacke; Nurse Shirley Brown; Nurse Melesia Henry; and several physicians and MUSC officials involved in obstetrical and neonatal care at MUSC. For ease of reference, we refer to these parties collectively as "Appellees." The parties evidently agree that only injunctive relief is being sought against those individual Appellees who are state officers sued in their official capacities. See Edelman v. Jordan, 415 U.S. 651, 677, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

(Law.Coop.Supp.1997).[2]

Pursuant to the policy formulated by the task force and implemented in late October or early November 1989, urine drug screens to detect evidence of cocaine use were given to all MUSC maternity patients when certain indicia of cocaine use were present: (1) separation of the placenta from the uterine wall; (2) intrauterine fetal death; (3) no prenatal care; (4) late prenatal care (beginning after 24 weeks); (5) incomplete prenatal care (fewer than five visits); (6) preterm labor without an obvious cause; (7) a history of cocaine use; (8) unexplained birth defects; or (9) intrauterine growth retardation without an obvious cause. When a patient tested positive, the test result was reported to CCPD or a representative of the Solicitor's Office and the patient was arrested for distributing cocaine to a minor. In early 1990, the policy was amended so that a patient who tested positive for cocaine use was given a choice between being arrested and receiving drug treatment. Positive test results of a patient who elected drug treatment were not forwarded to CCPD, and the patient was not arrested, unless she tested positive for cocaine use a second time or failed to comply with treatment obligations. A patient who was arrested could avoid prosecution by completing a drug treatment program. Upon successful completion of such a program, the charges would be dismissed.[3]

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[2] The South Carolina Supreme Court previously had held that a viable fetus was a person within the meaning of South Carolina criminal law. See State v. Horne, 282 S.C. 444, 319 S.E.2d 703, 704 (1984). Subsequently, the court upheld a conviction for criminal child neglect in a case involving a woman who ingested cocaine while pregnant with a viable fetus. See Whitner v. State, 328 S.C. 1, 492 S.E.2d 777, 778-84 (1997), cert. denied, --- U.S. ---, 118 S.Ct. 1857, 140 L.Ed.2d 1104 (1998).

[3] The dissent repeatedly characterizes Appellees' actions in implementing the policy as animated by a vindictive purpose to prosecute women who used cocaine during pregnancy. The record simply does not support this. Although the very real possibility of arrest was employed as an incentive for women to comply with treatment obligations, the record is abundantly clear that Appellees were motivated by a desire to protect the health of children born at MUSC, and that the policy was formulated and implemented with this goal in mind. Indeed, the district court so found. See J.A. 2739 (finding that the "goal [of the policy] was not to arrest patients but to facilitate their

Implementation of the policy by MUSC involved substantial record keeping and educational efforts. A maternity patient whose urine tested positive for cocaine use was shown an educational video concerning the harmful effects of cocaine use during pregnancy and was given letters from the Solicitor's Office and the hospital staff relating to the policy. In addition, MUSC personnel advised the patient of the need to obtain substance abuse counseling and scheduled an initial appointment for such counseling. The patient then was given a document noting the date and time of the appointment. Additionally, MUSC maintained records on patients whose urine tested positive for cocaine use as a means of tracking them to ensure that they complied with the

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treatment and protect both the mother and unborn child"). And, the evidence in the record more than amply supports this finding. See, e.g., J.A. 583 (testimony of Nurse Shirley Brown) (confirming that the reason for the policy was "concern ... for the health and safety and care of these fetuses and soon to be children"); id. at 602 (testimony of Nurse Shirley Brown) (agreeing that "it was always the intention of you and the people at the Medical University of South Carolina, and in fact from what you learned at these meetings, [the] Charleston Police Department, ... [and] the Solicitor, to help the women get treatment, not to arrest them, not to prosecute them, not to cause them to go to jail"); id. at 779-80 (testimony of Solicitor Charles Condon) (stating that "the problem presented to us at that time [was], how to help these babies and how to stop the totally preventable damage being done to these innocent little children" and explaining that "[t]he policy from its inception was amnesty-based.... [I]f you lived up to some very basic requirements, number one being drug free, ... and, number two, if you would go to free drug treatment, not a thing would happen to you"); id. at 785-86 (testimony of Solicitor Charles Condon) ("The idea that we were involved in a prosecution program is almost laughable.... The idea was not to prosecute people and put them in jail, the idea was to use legal intervention that was working to change human behavior to protect children, to protect babies."); id. at 863 (testimony of MUSC's General Counsel) ("[T]his was not supposed to be a punitive policy where we went out and punished people for doing something, even though we knew the activity was illegal. What we were trying to do is give those babies a chance to be born normal."). Indeed, while some of the Appellants were arrested, not one of them was prosecuted; this fact belies the dissent's assertion that a purpose of the policy was to convict and punish women who used cocaine during pregnancy.

requirements of the policy.

Appellants, all of whom were subjected to the policy,[4] brought this action asserting, as pertinent here, infringement of their constitutional right to privacy; violation of their Fourth Amendment right to be free of unreasonable searches and seizures; disparate impact discrimination on the basis of race; and commission of the state-law tort of abuse of process. After presentation of the evidence, the district court granted judgment as a matter of law to Appellees on the claims of commission of abuse of process and violation of the right to privacy to the extent Appellants sought damages. The jury returned a verdict in favor of Appellees on the Fourth Amendment claim. At a post-trial hearing, the court denied injunctive relief on Appellants' claims of the denial of their constitutional right to privacy. Finally, the district court rendered findings of fact based on the evidence presented at trial and ruled in favor of Appellees on the Title VI claim of disparate impact discrimination.

On appeal, Appellants challenge the submission of the Fourth Amendment claim to the jury and the sufficiency of the evidence supporting the verdict; the decision of the district court granting judgment to Appellees on the Title VI claim; and the orders of the court granting Appellees judgment as a matter of law on the claims for violation of the constitutional right to privacy and commission of the tort of abuse of process. We review these issues seriatim.

II.

At trial, Appellants contended that the urine drug screens constituted searches within the meaning of the Fourth Amendment. They further claimed that because they did not consent to the screens, the tests violated the Fourth Amendment.[5] The district court ruled that the urine screens fell within the ambit of the Fourth

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[4] At least two Appellants were subjected to urine drug screens shortly before formal adoption of the policy. Testimony in the record indicates, however, that MUSC personnel began to apply the policy informally in October 1989.

[5] MUSC personnel did not obtain warrants before conducting the urine drug screens.

Amendment and submitted the question of whether Appellants had consented to the searches to the jury, which found in favor of Appellees. Appellants now maintain that the district court erred in submitting the issue of consent to the jury and, alternatively, that the verdict is not supported by the evidence. We find it unnecessary to address these contentions because we affirm on the basis that the searches were reasonable as special needs searches.

The Fourth Amendment, made applicable to the states through the Fourteenth Amendment, provides in pertinent part that "[t]he right of the people to be secure in their persons ... against unreasonable searches and seizures[ ] shall not be violated." U.S. Const. amend. IV; see Mapp v. Ohio, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Simply put, this amendment guarantees that governmental intrusions into privacy by means of searches or seizures must be reasonable. Typically, this reasonableness requirement acts as a constraint on governmental authority to undertake a search or seizure in the absence of individualized suspicion. See Chandler v. Miller, 520 U.S. 305, 308, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997). Generally, a search performed without a warrant is unreasonable per se unless it fits within a narrowly defined exception to the warrant requirement. See, e.g., Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); United States v. Lattimore, 87 F.3d 647, 650 (4th Cir. 1996) (en banc). Nevertheless, "neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). Rather, there are situations in which "a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement." Id. In such cases, "it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." Id. at 665-66, 109 S.Ct. 1384; see Chandler, 520 U.S. at 314, 117 S.Ct. 1295 (explaining that "[w]hen ... 'special needs'-- concerns other than crime detection--are alleged in justification of a Fourth Amendment intrusion, courts must

undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties"). This balancing requires consideration of the governmental interest prompting the invasion; the effectiveness of the intrusion, i.e., the degree to which the intrusion reasonably is thought to advance the governmental interest; and the magnitude of the intrusion upon the individuals affected, from both a subjective and objective stand point. See Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990); id. at 451-55, 110 S.Ct. 2481 (applying test); DesRoches v. Caprio, 156 F.3d 571, 574 (4th Cir. 1998).

The parties evidently have agreed throughout this litigation that MUSC is a state hospital and that MUSC employees therefore are government actors.[6] And, the district court found as a fact that MUSC personnel conducted the urine drug screens for medical purposes wholly independent of an intent to aid law enforcement efforts.[7] Accordingly, the question presented is whether a

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[6] Our analysis is premised on the assumption that when a state hospital develops a general policy to test the urine of certain patients suspected of drug use, the testing constitutes a search within the meaning of the Fourth Amendment. But cf. United States v. Attson, 900 F.2d 1427, 1432- 33 (9th Cir. 1990) (holding that government-employed doctor who, for medical purposes, tests a patient's urine for evidence of alcohol use does not conduct a search within the meaning of the Fourth Amendment unless he "act [s] with the intent to assist the government in its investigatory or administrative purposes and not for an independent purpose").

[7] The district court declined to hold the searches at issue here reasonable under a special needs analysis because law enforcement officers were involved in the formulation of the policy. However, the involvement of law enforcement officers does not make a special needs analysis inappropriate. See Sitz, 496 U.S. at 451-55, 110 S.Ct. 2481 (upholding, under a special needs balancing test, a sobriety checkpoint operated by uniformed police officers); Norwood v. Bain, 166 F.3d 243, 245 (4th Cir. 1999) (en banc)(per curiam), cert. denied, --- U.S.---, 119 S.Ct. 2342, 144 L.Ed.2d 239 (U.S. 1999).

The dissent makes the related argument that the use of evidence obtained during the searches to support the arrest of some patients precludes application of the special needs balancing test. We disagree with this proposition, as does the Supreme Court. See Griffin v. Wisconsin, 483 U.S. 868, 870, 875-77, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987) (determining that

balancing of MUSC's interest in protecting the health of children whose mothers use cocaine during pregnancy, the effectiveness of the policy to identify and treat women who use cocaine during pregnancy, and the degree of intrusion experienced by women whose urine was tested for evidence of cocaine use results in a conclusion that the searches violated the Fourth Amendment.

A.

The first factor to be considered is the governmental need. The Fourth Amendment does not require a governmental need that is compelling in an absolute sense. See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). Instead, the interest must be "important enough to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy." Id.; see Chandler, 520 U.S. at 318, 117 S.Ct. 1295. The hazard giving rise to the alleged special need must be a concrete danger, not merely a hypothetical one. See Chandler, 520 U.S. at 318-19, 117 S.Ct. 1295; Vernonia, 515 U.S. at 662-63, 115 S.Ct. 2386 (explaining that a sharp rise in drug use by student athletes supported school officials' assertion that random drug testing without individualized suspicion was warranted).

The policy at issue here was developed after medical personnel at

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warrantless search based on reasonable grounds was justified by the special needs of the Wisconsin probation system even though evidence gathered during the search was employed to support a criminal conviction); see also Sitz, 496 U.S. at 448, 110 S.Ct. 2481 (noting that suspicionless stop at sobriety checkpoint resulted in arrest for driving under the influence). The dissent's attempt to distinguish Sitz is unpersuasive. It is true that the decision of the Court "address[ed] only the initial stop of each motorist passing through a checkpoint and the associated preliminary questioning and observation by checkpoint officers." Sitz, 496 U.S. at 450-51, 110 S.Ct. 2481. However, the fact that the initial suspicionless seizures led ultimately to an arrest cannot have escaped the attention of the Court. If, as the dissent contends, the intent to use information obtained during a suspicionless seizure to further investigate and ultimately arrest an individual rendered the special needs analysis inappropriate, Sitz would have been decided differently.

MUSC noticed an alarming increase in the number of pregnancies affected by cocaine use. Maternal cocaine use is associated with a number of pregnancy complications, including low birth weight, premature labor, birth defects, and neurobehavioral problems. Even a single use of cocaine during pregnancy may result in separation of the placenta from the uterine wall--a condition that may threaten the life of the mother and the fetus--or a stroke in the fetus. Moreover, costs related to caring for infants exposed to cocaine in utero are substantial, as evidenced by the testimony of an expert for Appellants who testified that he had estimated in the late 1980s that such expenses nationwide might exceed three billion dollars annually over the next ten years. In light of the documented health hazards of maternal cocaine use and the resulting drain on public resources, MUSC officials unquestionably possessed a substantial interest in taking steps to reduce cocaine use by pregnant women. Cf. Vernonia, 515 U.S. at 661-62, 115 S.Ct. 2386 (concluding that interest in deterring drug use by school children was important in light of severe effects of drug use on adolescents).

B.

The second factor, the effectiveness of the search, focuses on "the degree to which [it] advances the public interest." Sitz, 496 U.S. at 453, 110 S.Ct. 2481 (internal quotation marks omitted). In analyzing this factor, however, our review must leave "the decision as to which among reasonable alternative ... techniques should be employed to deal with a serious public danger" to "the governmental officials who have a unique understanding of, and a responsibility for, limited public resources." Id. at 453-54, 110 S.Ct. 2481.

Here, there can be little doubt that testing the urine of maternity patients when certain indicia of possible cocaine use were present was an effective way to identify and treat maternal cocaine use while conserving the limited resources of a public hospital. Indeed, prenatal testing was the only effective means available to accomplish the primary policy goal of persuading women to stop using cocaine during their pregnancies in order to reduce health

effects on children exposed to cocaine in utero.

Appellants argue, however, that the policy was ineffective because it was both underinclusive and overinclusive. The policy was underinclusive, Appellants claim, because it did not address use of other drugs--such as alcohol and nicotine--that may pose risks to a developing fetus. And, Appellants maintain that the policy was overinclusive because women were tested on the basis of having received inadequate prenatal care, a factor that Appellants contend is more accurately associated with poverty than with cocaine use.

Neither of these assertions, even if true, has any bearing on the effectiveness of the means adopted to achieve the goal of identifying and treating maternal cocaine use among MUSC patients. The first fails because it addresses only the wisdom of the policy itself. And, the second fails because the fact that the criteria for testing under the policy did not necessarily correlate with cocaine use in all patients did not render those criteria ineffective. Accordingly, we conclude that the method chosen by MUSC officials was an effective one.[8]

C.

Finally, the degree of intrusion, both objective and subjective, suffered by Appellants was minimal. The objective intrusion suffered by an individual is "measured by the duration of the seizure and the intensity of the investigation." Id. at 452, 110 S.Ct. 2481. The subjective level of intrusion is measured by the extent to which the method chosen minimizes or enhances fear and

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[8] The dissent maintains that the urine screens were not an effective means of identifying cocaine use by pregnant women because some patients were arrested after giving birth, when "any adverse effect of maternal cocaine use on the developing fetus had already occurred." Infra at 27. In applying the special needs balancing test, however, the proper focus is not on whether any arrests under the policy were an effective means of advancing the identified government interest, but rather on the effectiveness of the urine screens. Urine screens conducted up to the time of birth unquestionably were effective to determine whether a woman had used cocaine during her pregnancy and thus whether her child required treatment for prenatal exposure to cocaine.

surprise on the part of those searched or detained. See id.

Generally, the privacy interests implicated by the collection and testing of urine are not minimal. See Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 626, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). The context in which the searches at issue here occurred, however, indicates that they were only minimally intrusive. In the first place, the collection and testing of urine was conducted in the course of medical treatment to which Appellants had consented. The giving of a urine sample is a normal, routine, and expected part of a medical examination. See Yin v. California, 95 F.3d 864, 870 (9th Cir. 1996) (observing that "[i]n today's world, a medical examination that does not include either a blood test or urinalysis would be unusual"). Therefore, on an objective level, the duration and intensity of the search indicate that the Fourth Amendment intrusion was minimal at best. Cf. Dimeo v. Griffin, 943 F.2d 679, 682 (7th Cir. 1991) (en banc) (indicating that a urine drug screen conducted in the course of a medical examination presents reduced privacy concerns). With respect to the subjective level of intrusion, we note that urine drug screens were conducted whenever one of the criteria for testing was met; a treating physician had no discretion to decline to order a urine test under the policy. See Turner v. Dammon, 848 F.2d 440, 446-47 (4th Cir. 1988) (explaining that "[t]he cases upholding warrantless administrative searches clearly establish that these rules require certainty, regularity, and neutrality in the conduct of the searches"). This fact, combined with the routine nature of urine testing in medical examinations, indicates that the searches were minimally intrusive on a subjective level.

D.

In sum, the rising use of cocaine by pregnant women among MUSC's patient base and the public health problems associated with maternal cocaine use created a special need beyond normal law enforcement goals; the method chosen to address that need--testing the urine of pregnant women when indicia of possible cocaine use were present--effectively advanced the public interest; and the intrusion suffered by Appellants was minimal.

Therefore, a balancing of these factors clearly demonstrates that the searches conducted were reasonable and thus not violative of the Fourth Amendment.

III.

Title VI provides in pertinent part that "[n]o person in the United States shall, on the ground of race, ... be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C.A. § 2000d. Pursuant to Title VI, Appellants[9] challenged MUSC's policy of testing for and reporting cocaine use by pregnant women, maintaining that it disparately impacted African-American women.[10]

In order to succeed on a Title VI disparate impact claim, a plaintiff first must establish a prima facie case of discrimination by showing "that a facially neutral practice has a disproportionate adverse effect on a group protected by Title VI." Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993). The burden then "shifts to the defendant to demonstrate the existence of a substantial legitimate justification for the allegedly discriminatory practice." New York Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995) (per curiam) (internal quotation marks omitted). If the defendant succeeds in doing so,

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[9] Of the ten Appellants, eight are African-American, one is of mixed race, and one is Caucasian.

[10] Although the statutory language of Title VI addresses only intentional discrimination, federal agencies that provide funds may prohibit disparate impact discrimination through regulations implementing Title VI. See Alexander v. Choate, 469 U.S. 287, 293, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985) (discussing holdings of Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983)); New York Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995) (per curiam). The parties agree that at least one federal agency that provides funds to MUSC has promulgated regulations prohibiting disparate impact discrimination in the operations of programs or activities. See, e.g., 45 C.F.R. § 80.3(b)(2) (1997) (providing that recipients of funds from the Department of Health and Human Services may not, in furnishing services or benefits, "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race").

the plaintiff nevertheless will prevail by showing "that other less discriminatory means would serve the same objective." Id.

Here, Appellants maintained that the policy disproportionately affected African-Americans in several ways. Specifically, Appellants argued that African-Americans were disproportionately affected by application of the policy (1) only at MUSC; (2) only to certain departments at MUSC; and (3) only to cocaine. Appellants further asserted that the application of the factors utilized to determine which patients would be tested for cocaine use disproportionately affected African-Americans. The district court concluded that Appellants had failed to establish a prima facie case of discrimination with respect to any of the challenged practices. Additionally, the district court determined that even if a prima facie case of discrimination had been established, MUSC[11] had offered a legitimate justification for the policy -- that it identified pregnant women who abused cocaine so that they could be referred for treatment. Further, the court held that Appellants had failed to carry their burden of establishing the existence of an equally effective practice that would have a less disparate impact because the alternative practices offered by Appellants would have been prohibitively expensive.

Appellants now contend that the district court erred in concluding

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[11] Appellants' counsel represented to the district court that Appellants were pursuing the Title VI claim only against MUSC. Appellants now contend, however, that this representation was "mistaken" and should be ignored by this court. Reply Br. of Appellants at 11. Even if we could do so, the evidence presented was inadequate to establish liability under Title VI against the Solicitor or the City of Charleston -- the defendants to whom Appellants now point.

Our review of the record reveals nothing to support a conclusion that the Solicitor or the City of Charleston possessed authority to require other hospitals to implement the policy. Accordingly, Appellants failed to prove that either of these parties implemented a policy that resulted in a disparate impact on African-Americans. Indeed, the testimony of Solicitors Condon and Schwacke indicates that they unsuccessfully attempted to persuade other area hospitals to adopt policies similar to MUSC's; this testimony leaves the unmistakable impression that if either Solicitor could have forced health care providers to implement such a policy, he would have done so.

that they failed to establish a prima facie case of discrimination and to provide a viable, less discriminatory alternative. With respect to the establishment of a prima facie case, Appellants assert that the policy resulted in a disproportionate impact on African-Americans in two respects.

First, Appellants point to the fact that the policy was implemented only at MUSC and maintain that failure to apply the policy at all area hospitals resulted in a disproportionate effect on African-Americans. However, we need not consider whether the failure to apply the policy to all area hospitals would suffice to establish a prima facie case of discrimination. Because there is no evidence in the record to support a conclusion that MUSC could have forced other hospitals to adopt the policy, requiring MUSC to implement the policy at other area hospitals could not constitute a viable, less discriminatory alternative. Appellants consequently cannot prevail on this claim.

Second, Appellants maintain that MUSC's decision to target cocaine rather than all substances that are potentially harmful to fetuses -- including nicotine and alcohol -- disproportionately affected African-American women. In support of this contention, Appellants note that only 68 percent of maternity patients who tested positive for any drug were African-American, while 90 percent of maternity patients who tested positive for cocaine were African- American.[12] We agree that this disparity -- 5.44 standard deviations -- is sufficient to establish a prima facie case of disparate impact discrimination. See Hazelwood Sch. Dist. v.

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[12] The district court rejected this argument, concluding without explanation that the relevant comparison was between the racial composition of the group of women who tested positive for cocaine use and the racial composition of the group of women who were arrested based on positive urine drug screens. The difference in the racial composition of these two groups, the court noted, was not statistically significant. We reject this reasoning. As the Supreme Court has noted, it is not sufficient for a defendant to show a racial balance at the end of a selection process; rather, the pertinent question for purposes of a disparate impact analysis is whether a given step in the process disproportionately affects members of one race. See Connecticut v. Teal, 457 U.S. 440, 450-51, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982).

United States, 433 U.S. 299, 311 n. 17, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977) (observing that a variance "of more than two or three standard deviations" permits an inference of discrimination); Lewis v. Bloomsburg Mills, Inc., 773 F.2d 561, 568-69 & n. 13 (4th Cir. 1985) (noting that variance of five to eight standard deviations permits an inference of discrimination).[13]

MUSC justified its decision to target cocaine on the basis of a perceived rise in the number of pregnant women abusing cocaine and the resistance of these women to obtaining treatment for their addictions. Appellants do not dispute that these are legitimate, nondiscriminatory reasons for MUSC's actions, but rather assert that at least two alternative practices exist which, if adopted, would have lessened the discriminatory impact of the policy: (1) reporting use of all illegal drugs and alcohol, and (2) testing all maternity patients.[14] The district court found that both of these practices would have been prohibitively expensive. See Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 661, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) (explaining that determination whether alternative measures exist that would serve the same purpose as a

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[13] In its memorandum opinion, the district court stated that the comparison was "between the MUSC maternity population and those who tested positive for cocaine." J.A. 2743. We need not resolve this ambiguity, however, because either comparison results in a statistical difference of greater than three standard deviations.

[14] Appellants also argue that other substances, including nicotine and alcohol, pose dangers to a fetus that are as great, or greater than, the dangers posed by cocaine. Appellants therefore assert that MUSC's decision to target cocaine -- a drug predominantly used by African-Americans -- is merely a pretext for discrimination. First, we note that this argument is relevant only to Appellants' claim of intentional racial discrimination, a claim that was rejected by the jury and that Appellants have not raised on appeal. Second, we find no evidence of pretext in MUSC's decision to target cocaine use -- a problem that MUSC perceived as being particularly urgent -- rather than testing for all potentially harmful substances. Cf. Bowen v. Owens, 476 U.S. 340, 347, 106 S.Ct. 1881, 90 L.Ed.2d 316 (1986) (noting that "[t]his Court consistently has recognized that in addressing complex problems a legislature 'may take one step at a time, addressing itself to the phase of the problem which seems most acute' " (quoting Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955))).

challenged practice with a less disparate impact should take into account whether the proposed alternatives impose undue costs or other burdens). With respect to the first alternative, Appellants point out that the urine drug screens conducted by MUSC indicated the past use of any drug, not just cocaine. Appellants do not challenge, however, the factual finding of the district court that application of the policy -- including its tracking and reporting requirements -- to all drugs would have been prohibitively expensive. Further, they do not assert that the district court committed clear error in finding that testing the urine of all maternity patients at MUSC would have been prohibitively expensive. Accordingly, we cannot conclude that Appellants have demonstrated the existence of a means of accomplishing the goals of the policy that would have been equally effective while imposing a less disparate impact on African-Americans. We therefore conclude that the district court correctly granted judgment to Appellees on the Title VI claim.

IV.

Next, Appellants maintain that the district court erred in rejecting their claim that the disclosure of information contained in their medical records to a representative of the Solicitor's Office and officers of the CCPD violated their constitutional right to privacy.[15] We conclude that any privacy interest Appellants possessed in their medical records was outweighed by a compelling governmental interest, particularly in light of the nonpublic nature of the disclosure.

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[15] Appellants also contend that the actions of Nurse Laura Hildebrand, who disclosed medical information concerning Appellants at meetings of the Suspected Child Abuse and Neglect (SCAN) committee, violated their right to privacy. The district court concluded that even if these allegations of disclosure were correct, Appellants were not entitled to any damages based on the actions of Nurse Hildebrand because she was not a party defendant. Further, the court concluded that Appellants were not entitled to injunctive relief because the SCAN committee had been disbanded and there was no indication that it would be reconstituted at any point in the future. We affirm these rulings.

The Constitution does not include a general right to privacy. See Condon v. Reno, 155 F.3d 453, 464 (4th Cir. 1998). Nevertheless, the Supreme Court has recognized that individuals possess a constitutional "interest in avoiding disclosure of personal matters." Whalen v. Roe, 429 U.S. 589, 599, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). This interest, however, is limited to disclosures of information that touch on rights that "are fundamental or implicit in the concept of ordered liberty." Paul v. Davis, 424 U.S. 693, 713, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) (internal quotation marks omitted); see Bloch v. Ribar, 156 F.3d 673, 684 (6th Cir. 1998); United States v. McFillin, 713 F.2d 57, 60 (4th Cir. 1981) (holding that a constitutional right to privacy is implicated when the information disclosed "affects an essential component of a person's dignity"); cf. Condon, 155 F.3d at 464 (noting that the Supreme Court has recognized a constitutional right to privacy only with respect to certain limited areas, such as "matters of reproduction, contraception, abortion, and marriage" (citations omitted)). Moreover, even in those instances in which a constitutional right of privacy attaches to personal information, disclosure of that information will not violate the Constitution if "the government's interest in disseminating the information" outweighs "the individual's interest in keeping the information private." Bloch, 156 F.3d at 684.

Although the Supreme Court addressed a claim to a right of privacy in medical records in Whalen, it declined to decide whether such information merits constitutional privacy protection. See Whalen, 429 U.S. at 605-06, 97 S.Ct. 869. And, the circuit courts of appeals are divided on this issue. Compare Doe v. Southeastern Pa. Transp. Auth., 72 F.3d 1133,1137 (3d Cir. 1995) (recognizing that an individual possesses a constitutional privacy right in medical records), with Jarvis v. Wellman, 52 F.3d 125, 126 (6th Cir. 1995) (holding that no constitutionally protected privacy interest exists in medical records). We need not decide the question, however, because we conclude that even if Appellants possess a constitutional interest in the nondisclosure of their medical records, that interest is outweighed by the interest of the government in disclosure.

It is well settled that a state has a compelling interest in the identification of law breakers and in deterring future misconduct. See Bloch, 156 F.3d at 686; Sanitation & Recycling Indus., Inc. v. New York, 107 F.3d 985, 998 (2d Cir. 1997). Here, any medical records disclosed were disseminated only to a limited number of law enforcement personnel -- the prosecuting attorney and arresting officers -- in the course of their official duties. There is no indication that Appellants' medical records were disclosed to others within the Solicitor's Office, the CCPD, or the public in general. See American Fed'n of Gov't Employees, AFL-CIO v. Department of Housing & Urban Dev., 118 F.3d 786, 793 (D.C.Cir. 1997) (holding "that the individual interest in protecting ... privacy ... is significantly less important where the information is collected by the government but not disseminated publicly"); Watson v. Lowcountry Red Cross, 974 F.2d 482, 487-88 (4th Cir. 1992) (indicating that disclosure of information to a district court did not abridge constitutional privacy interest because the disclosure was not public). Accordingly, we hold that no privacy right of Appellants was violated.

V.

Finally, Appellants maintain that the district court erred in granting Appellees judgment as a matter of law on the claim that the manner in which the policy was applied constituted the state-law tort of abuse of process. More specifically, Appellants assert that MUSC personnel improperly threatened Appellants with arrest in order to coerce them into obtaining substance abuse counseling.

Under South Carolina law, "[t]he essential elements of abuse of processare: (1) an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding." Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860, 860 (1983). "The improper purpose usually takes the form of coercion to obtain a collateral advantage[ ] not properly involved in the proceeding itself." Hainer v. American Med. Int'l, Inc., 328 S.C. 128, 492 S.E.2d 103, 107 (1997). In order to satisfy the requirement of an improper act, the plaintiff must show that the

defendant made "[s]ome definite act or threat not authorized by the process or aimed at an object not legitimate in the use of the process.... There is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." Id.

Here, the district court determined that MUSC personnel did not have an improper ulterior purpose in advising women who tested positive for cocaine use that they would be subject to arrest if they did not obtain substance abuse counseling. Since Appellees did not seek to obtain any collateral advantage for themselves, the court reasoned, there could be no abuse of process. We need not decide whether Appellees had an ulterior purpose, however, because we conclude that they performed no act not authorized by the process. At most, Appellees accurately informed Appellants that ingestion of cocaine after the 24th week of pregnancy constituted a criminal offense for which they could be prosecuted. That maternity patients who tested positive for cocaine use could avoid criminal prosecution by obtaining treatment does not render the implementation of the policy abusive. Cf. Johnson, 307 S.E.2d at 861 (holding that offer to abandon criminal prosecution in exchange for restitution did not amount to abuse of process).

VI.

In sum, we reject Appellants' challenges to the judgments in favor of Appellees. Accordingly, we affirm.

AFFIRMED.

BLAKE, District Judge, dissenting in part:

The majority has concluded that the warrantless testing of urine for evidence of cocaine use which resulted in the arrest of nine of the 10 plaintiffs in this case constituted a reasonable search under the "special needs" exception to the warrant requirement of the Fourth Amendment. On this point, respectfully, I dissent. Furthermore, I disagree with the majority's conclusion that as to the Title VI claim the appellants failed to demonstrate the

existence of a less discriminatory alternative policy. Accordingly, I would reverse the district court's decisions concerning the appellants' Fourth Amendment and Title VI claims and remand for consideration of appropriate relief.

I.

Some additional factual background is necessary to explain my position on the Fourth Amendment issue. Preliminarily, assuming that concern for the health of fetuses being carried by pregnant women using crack cocaine was a motivating force in the development of the MUSC policy, it nevertheless is clear from the record that an initial and continuing focus of the policy was on the arrest and prosecution of drug-abusing mothers, either before or after they had given birth to the children presumably affected by the cocaine use.[1] The prosecutorial purpose of the policy and the substantial involvement of law enforcement officials from the very beginning of its implementation are both illustrated by a letter sent by MUSC General Counsel Joseph C. Good to Charles Condon, Charleston City Solicitor, on August 23, 1989. In the letter, Mr. Good wrote:

> I read with great interest in Saturday's newspaper accounts of our good friend, the Solicitor for the Thirteenth Judicial Circuit, prosecuting mothers who gave birth to children who tested positive for drugs....
> Please advise us if your office is anticipating future criminal action and what if anything our Medical Center needs to do to assist you in this matter.

(J.A. Vol. III at 2052.) In addition, operational guidelines issued by Captain Roberts of the Charleston police force on October 12, 1989, with copies to Solicitor Condon and to MUSC nurse Shirley Brown (one of the instigators of the MUSC program), refer to the positive drug tests as "probable cause" for arrest of the mother, on charges of possession only if the pregnancy is 27 weeks or less, and on charges of both possession and distribution to persons

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[1] As set forth in greater detail below, seven of the plaintiffs were arrested after the birth of their children.

under 18 if the pregnancy is 28 weeks or more. (J.A. Vol. III at 1412-1414.)[2] Further, a letter from Mr. Good to a Senior Assistant Attorney General on December 19, 1989, explaining the MUSC program, states that it was developed by MUSC "[a]t the suggestion of law enforcement and the solicitor's office...." (J.A. Vol. III at 1457.) These are merely a few examples of the evidence in the record that supports a finding of both prosecutorial intent on the part of MUSC and substantial involvement of law enforcement officials in developing the program.

Following is a short summary of the circumstances under which the plaintiffs in this case were tested and arrested:

Sandra Powell, African-American, received prenatal care at MUSC from the end of her first trimester. (J.A. Vol. I at 322.) In October 1989, she delivered her child at MUSC and tested positive for cocaine. (J.A. Vol. III at 1842-44, 1853.) She was arrested at the hospital the following day. (J.A. Vol. III at 1844, 1852.)

Lori Griffin, African-American, received prenatal care at MUSC beginning in July 1989. (J.A. Vol. III at 1563.) She was admitted to the hospital on October 7, 1989, with contractions. (J.A. Vol. III at 1560.) She tested positive for cocaine. (J.A. Vol. III at 1559.) She was arrested and taken to the county jail. (J.A. Vol. III at 1560, 1563.) She was returned to MUSC from jail on October 25, 1989, to deliver her child.

Ellen Knight, African-American, received prenatal care at MUSC prior to the fall of 1989. (J.A. Vol. I at 293.) She arrived at the hospital on November 6, 1989, in labor. (J.A. Vol. III at 1698.) Although her cocaine test was negative, her child tested positive at birth. (J.A. Vol. III at 1705, 1707.) She was arrested at the

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[2] In regard to the Title VI issue, it should be noted that the police department guidelines are not limited to cocaine only but refer to "illegal drugs" generally, which the guidelines define as "heroin, crack/cocaine, amphetamines, and any other drug illegally ingested by the patient that medical authorities deem a threat to the life and safety of the unborn child." (J.A. Vol. III at 1412.)

hospital on November 8, 1989.

Laverne Singleton, African-American, delivered her child on November 9, 1989, in the ambulance on the way to MUSC. (J.A. at I 225; Vol. III at 1859, 1865.) She tested positive for cocaine at the time of admission. (J.A. Vol. III at 1859-60.) She was arrested at the hospital the next morning. (Id.)

Paula Hale, African-American, first arrived at MUSC in December 1990 in labor. (J.A. Vol. III at 1581-83.) She tested positive for cocaine at delivery and was referred to substance abuse counseling. (Id.) She was arrested in March 1991 after failing to complete the drug treatment program. (J.A. Vol. III at 1585-86.)

Pamela Pear, African-American, arrived at MUSC in July 1990 with pre-term labor symptoms. (J.A. Vol. III at 1817.) She tested positive for cocaine during that visit. (Id.) She was referred to substance abuse counseling. (J.A. Vol. III at 1736.) In August 1990, she was again admitted to MUSC for pre-term labor and tested positive for cocaine. (J.A. Vol. III at 1757.) She was arrested at the hospital and was released on bond the same day. She delivered her child at MUSC in September 1990. (J.A. Vol. III at 1765.)

Theresa Joseph, who was multi-racial,[3] was first seen at MUSC on June 5, 1991, for a non-pregnancy related matter. (J.A. Vol. III at 1599.) She tested positive for cocaine at that time and was referred to the obstetrical clinic. (J.A. Vol. III at 1601-02.) She was admitted to the hospital again, for the same non-pregnancy complaint, on June 13, 1991. She again tested positive for cocaine and was referred to substance abuse counseling. (J.A. Vol. III at 1612, 1626.) She failed to complete the substance abuse program in July 1991. (J.A. Vol. III at 1656, 1682.) She was seen again in September 1991 and once more tested positive for cocaine. (J.A. Vol. I at 515; Vol. III at 1628- 29.) Finally, she arrived at MUSC

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[3] Ms. Joseph is now deceased. She was described as "black" on her Charleston Police Department Incident Report. (J.A. Vol. III at 1655.)

in October 1991 in labor and tested positive for cocaine. (J.A. Vol. III at 1632, 1634.) Her child was born on October 18, 1991, and Ms. Joseph was arrested at the hospital. (Id.)

Crystal Ferguson, African-American, tested positive for cocaine during a prenatal visit to MUSC in June 1991. (J.A. Vol. III at 1530.) She agreed to attend substance abuse counseling. (J.A. Vol. III at 1537.) On August 4, 1991, she delivered her child at MUSC. She tested positive for cocaine at that time. (J.A. Vol. III at 1533.) She was arrested on August 7, 1991, for failing to comply with the drug treatment program. (J.A. Vol. III at 1541.)

Patricia Williams, African-American, received prenatal care at MUSC beginning in January 1992. (J.A. Vol. III at 1910.) She tested positive for cocaine at the time of her first visit and was referred to substance abuse counseling. (J.A. Vol. III at 1903, 1939-40.) She did not complete the counseling program and returned for additional prenatal care three times, testing positive for cocaine each time. (J.A. Vol. III at 1901-02, 1907.) In March 1992, she arrived at the hospital in labor. (J.A. Vol. III at 1910-11.) She again tested positive for cocaine. (Id.) Her baby was born on March 10, 1992, and on March 12, 1992, she was arrested at the hospital. (Id.)

Darlene Nicholson, Caucasian, received regular prenatal care at MUSC. (J.A. Vol. I at 447-48, 450; Vol. III at 1717, 1724.) At her December 17, 1993 prenatal visit she tested positive for cocaine. (J.A. Vol. I at 452-53.) At that time, she was told that she must voluntarily admit herself to the MUSC psychiatric unit for substance abuse treatment or she would be arrested. (Id.) She entered the psychiatric unit and remained there until she was released after 30 days. (J.A. Vol. III at 1717.) She delivered her child at MUSC on February 21, 1994. (J.A. Vol. I at 458.)

In none of these cases was a warrant obtained before the urine testing was done or before the results were turned over to the police and the plaintiffs were arrested. Furthermore, the consent forms signed by the plaintiffs did not advise them that their drug test results would be disclosed to the police. The majority excuses

the lack of a warrant, or indeed any determination of probable cause, by relying on the "special needs" exception to the ordinary Fourth Amendment requirement that a warrant be obtained.

II.

The Supreme Court has held that

> where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.

National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665-66, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989) (emphasis added). Similarly, the Court has instructed that

> When such "special needs" -- concerns other than crime detection -- are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.

Chandler v. Miller, 520 U.S. 305, 314, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997) (emphasis added). Several aspects of the "special needs" exception require careful analysis in the context of this case.

First, as the emphasized portions of the above quotations make clear, the "special needs" exception does not apply where the governmental intrusion is intended to be used for law enforcement purposes. In Von Raab, the issue was whether "it violates the Fourth Amendment for the United States Customs Service to require a urinalysis test from employees who seek transfer or promotion to certain positions." 489 U.S. at 659, 109 S.Ct. 1384. The Supreme Court in that case held that the Fourth Amendment permitted the suspicionless testing of employees who applied for positions directly involving the use of firearms or the interdiction of illegal drugs. Id. at 679, 109 S.Ct. 1384. In reaching this conclusion, the Court applied a "special needs" analysis, balancing the individuals' privacy interests against the non-law enforcement

governmental interests served by the urinalysis policy. Significantly, in deciding to apply the "special needs" balancing test to the facts before it, the Court emphasized that "[i]t is clear that the Customs Service's drug-testing program is not designed to serve the ordinary needs of law enforcement. Test results may not be used in a criminal prosecution of the employee without the employee's consent." Id. at 666, 109 S.Ct. 1384 (emphasis added). In fact, in none of the cases relied on by the majority, other than the sobriety checkpoint and probation supervision cases which will be addressed below, were the results of the drug tests or other searches intended for use in a criminal prosecution. See Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 651, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) (authorizing only certain school officials to have access to test results); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 621 & n. 5, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) ("While [the provision permitting drug testing of railroad personnel] might be read broadly to authorize the release of biological samples to law enforcement authorities, the record does not disclose that it was intended to be, or actually has been, so used."); Yin v. State of California, 95 F.3d 864, 869, 873 (9th Cir. 1996) (state employee required to submit to medical examination solely to determine her ability to perform normal work duties); Dimeo v.Griffin, 943 F.2d 679, 685 (7th Cir. 1990) (en banc) (jockeys and other participants in horse racing required to undergo random drug tests as condition of occupational licensure). In sharp contrast, nine out of ten of the plaintiffs in this case were arrested based on the test results, and one avoided arrest only by committing herself to a psychiatric unit. Under these circumstances, I believe the "special needs" exception does not apply.

The majority cites Michigan Department of State Police v. Sitz, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), and Griffin v. Wisconsin, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987), for the proposition that the defendants' intention to use the results of the drug tests as probable cause to arrest the plaintiffs in this case does not preclude application of the special needs balancing test. In Sitz, however, the Supreme Court was careful to explain that the special needs exception applied only to the

suspicionless "seizure," that is, the initial stop of each motorist and the associated preliminary questioning and observation, 496 U.S. at 450-51, 110 S.Ct. 2481, which the Court characterized as only a "slight" intrusion. Id. at 451, 110 S.Ct. 2481. The Court specifically noted that the "[d]etention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard." Id. at 451, 110 S.Ct. 2481 (citing United States v. Martinez-Fuerte, 428 U.S. 543, 559, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976)). The Sitz balancing test, which justifies the relatively slight intrusion of a checkpoint seizure, does not serve also to justify searches of the motorists' persons or effects without consent or probable cause. See United States v. Ortiz, 422 U.S. 891, 896- 97, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975). Griffin also is readily distinguishable. In that case, the Supreme Court upheld the validity of a warrantless search conducted by a state probation officer at the home of a criminal defendant on probation under a regulation which permitted such searches as long as the probation officer had "reasonable grounds" to believe the probationer possessed contraband forbidden under the conditions of his probation. The Court noted that probation was a form of criminal sanction imposed after a finding of guilt, 483 U.S. at 874, 107 S.Ct. 3164, and supervision of probationers was a " 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large." Id. at 875, 107 S.Ct. 3164.

Accordingly, I believe the majority reads Sitz and Griffin too broadly in suggesting that the special needs exception can justify a suspicionless search of a member of the public intended to produce evidence for use in a criminal arrest.

In this case, the MUSC policy was intended from its inception to result in the arrest and possible prosecution of pregnant women who were patients at the state hospital. In all the other special needs cases cited by the majority, arrest was at most an incidental possibility and not a direct result of the warrantless Fourth Amendment intrusion sought to be justified. It is simply inconsistent with the record in this case to identify the drug testing imposed by MUSC as not serving normal law enforcement needs.

I would find that the avowed and actual purpose of arresting patients who tested positive for cocaine, as well as the extensive involvement of law enforcement officials in designing and implementing the policy, preclude application of the special needs analysis in this case.

Even if I assume, however, that a special needs balancing test should be applied, and further assume that the governmental interest identified by the majority -- i.e., the adverse effect of maternal cocaine use on the health of children exposed to cocaine in utero -- is substantial, I believe that the policy fails the test of "effectiveness," i.e., "[t]he degree to which the search advances the public interest." See Sitz, 496 U.S. at 453, 110 S.Ct. 2481. It is undisputed that seven of the plaintiffs were arrested after giving birth (indeed, several were taken into custody at the hospital wearing only their hospital gowns), rather than during the prenatal period.[4] By that time, any adverse effect of maternal cocaine use on the developing fetus had already occurred, and the arrest could only have had a punitive rather than a preventive purpose.

Nor is it correct to say that the degree of intrusion on the mother's privacy was "minimal" simply because the test occurred in the context of a hospital examination. Unlike the policy in Von Raab, under the MUSC policy the test results are reported not simply to a licensed physician, but to law enforcement officials with no medical reason for receiving the information. Cf. Von Raab, 489 U.S. at 672 n. 2, 109 S.Ct. 1384 (noting as one of the procedures that minimized the intrusiveness of the drug-screening program that "an employee need not disclose personal medical information to the Government unless his test result is positive, and even then any such information is reported to a licensed physician").

For all the above reasons, I agree with the trial court that the drug testing policy applied to the plaintiffs in this case violated the

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[4] Moreover, several of the plaintiffs who were not arrested until after giving birth had tested positive for cocaine multiple times during the prenatal period when, according to the purported purpose of the policy, intervention was crucial.

Fourth Amendment, in the absence of valid consent.

The district court also properly found that the various consent forms signed by the plaintiffs, which did not advise them that the drug test results would be disclosed to the police, did not alone establish valid consent. Accordingly, the court submitted this case to the jury on the issue of consent, and the jury returned a verdict in favor of the defendants. The plaintiffs moved for judgment under Fed.R.Civ.P.50(b), and the court denied the motion.

I disagree that the evidence presented at trial was sufficient to sustain the jury's verdict. When considering a Rule 50(b) motion for judgment as a matter of law, the district court must view the evidence in the light most favorable to the non-moving party and then determine whether a reasonable jury could draw only one conclusion from the evidence. See Townley v. Norfolk & Western Ry. Co., 887 F.2d 498, 499 (4th Cir. 1989). We review the district court's ruling on a Rule 50(b) motion by applying the same standards de novo. Id. In addition to the consent forms, the defendants presented other evidence, such as letters that either accompanied the forms or were distributed after a positive test result, and a public service announcement issued by the Solicitor's Office in 1990. The public service announcement indicated that pregnant women who tested positive for drug use could be subject to prosecution; however, it was seen by only two of the plaintiffs. (J.A. Vol. I at 374, 518-19.) The plaintiffs' presumed familiarity with this information, even when combined with a general knowledge that use of cocaine is illegal, is not sufficient to establish the plaintiffs' voluntary and knowing consent to the possible use against them in a criminal case of drug test results taken in the course of their pregnancy and labor. Cf. Von Raab, 489 U.S. at 666, 109 S.Ct. 1384 (positive test results "may not be used in a criminal prosecution without the employee's consent"). I also question whether consent can be voluntary, in a constitutional sense, when given by an indigent, uninsured woman in labor, who is dependent on medical care provided by the state's public hospital. If the special needs exception had been held not to apply, a more thorough analysis of this issue would have been necessary.

III.

I agree with the majority's analysis of the Title VI issue, except with regard to the availability of an equally effective alternative policy with a less discriminatory impact.[5] The plaintiffs point out, correctly, that the urine tests being performed under the MUSC policy indicate a patient's past use, not just of cocaine, but of other illegal drugs as well. (J.A. Vol. II at 1336-42.) Consequently, applying the policy to the past use of all illegal drugs, not just cocaine, as the plaintiffs suggested, would not have increased the cost of the testing. The district court's finding that testing for all illegal drugs "would be prohibitively expensive," therefore, is not supported by the record. In affirming the decision below, the majority states that the plaintiffs have not challenged the district court's factual finding "that application of the policy – including its tracking and reporting requirements – to all drugs would have been prohibitively expensive." The district court, however, made no such finding. In considering the alternative of focusing on all illegal drugs, not just cocaine, the court relied only on the cost of testing, not tracking or reporting, to reject that alternative.[6] (J.A. Vol. IV at 2746). Since the plaintiffs have shown that their proposed alternative of applying the testing policy to past use of any illegal drug would not have resulted in any additional cost, the district court's fact- finding on the issue of the cost of testing is clearly erroneous, and the plaintiffs have carried their burden of demonstrating the availability of an equally effective alternative with a less discriminatory impact.[7] Accordingly, I would reverse the judgment in favor of the defendants on the Title VI claim and remand for consideration of injunctive relief.

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[5] The appellants' brief challenges the factual findings of the district court concerning the cost of the testing program and the overall effectiveness of the policy. (Brief of Appellants at 49).

[6] Nor is any evidence on this issue apparent in the record, except for evidence suggesting that the Charleston Substance Abuse Clinic, not MUSC, would notify police regarding missed substance abuse appointments, (J.A. Vol. III at 1430), and that the Solicitor's Office would be responsible for tracking compliance, generally. (J.A. Vol. I at 610-11.)

[7] The plaintiffs have not shown that the district court erred in rejecting their second alternative, i.e., testing all maternity patients at MUSC.

IV.

In summary, I would reverse the district court on the Fourth Amendment and Title VI claims, and remand for consideration of appropriate relief. On these two issues, respectfully, I dissent.

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DENYING PETITION FOR REHEARING AND REHEARING EN BANC
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
September 2, 1999

No. 97-2512
CA-93-2624-2-12

CRYSTAL M. FERGUSON; PAULA S. HALE; ELLEN L. KNIGHT; PATRICIA R. WILLIAMS; LORI GRIFFIN; PAMELA PEAR; SANDRA POWELL; LAVERNE SINGLETON; THERESA JOSEPH; DARLENE M. NICHOLSON

Plaintiffs - Appellants

And

STATE-RECORD COMPANY, INCORPORATED; THE EVENING POST PUBLISHING COMPANY

Intervenor - Plaintiff

- v.

CITY OF CHARLESTON, South Carolina; HARRISON L. PEOPLES, Dr.; THOMAS C. ROWLAND, JR., Dr.; STANLEY C. BAKER, JR., Dr.; CHARLES B. HANNA, Dr.; MELVYN BERLINSKY; PATRICIA T. SMITH; M. J. COOPER; HERBERT C. GRANGER; ROBERT C. LAKE, JR.; PHILLIP D. SASSER; CLAUDIA W. PEOPLES; CARROLL V. BING, JR., Dr., as Trustees of the Medical University of South Carolina in their official capacities; RUEBEN GREENBERG; CHARLES HORGER, III, M.D.; VICTOR DEL BENE; JOHN SANDERS; WILLIAM B. PITTARD, M.D.; ROGER NEWMAN, M.D.;

HAROLD BIVENS, M.D.; MELESIA HENRY, R.N., personally and in their official capacities

Defendants - Appellees

CENTER FOR CONSTITUTIONAL RIGHTS

Amicus Curiae

On Petition for Rehearing and Rehearing En Banc

Appellants filed a petition for rehearing and rehearing en banc.

The panel voted to deny the petition for rehearing.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of judges in active service in favor of rehearing en banc. Chief Judge Wilkinson and Judges Widener, Wilkins, Niemeyer, Hamilton, Luttig, Williams and Traxler voted against rehearing en banc and Judges Murnaghan, Ervin, Michael, Motz and King voted to rehear the case en banc. The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Wilkins for the Court.

For the Court,

/s/ Patricia S. Connor

CLERK

Filed September 29, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Civil Action No. 2:93-2624-2

Crystal M. Ferguson, Theresa Joseph, Darlene Nicholson, Paula S. Hale, Ellen L. Knight, Patricia R. Williams, Lori Griffin, Pamela Pear, Sandra Powell, and LaVerne Singleton,
Plaintiffs,

vs.

The City of Charleston, South Carolina, et al.,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This action was brought by ten women pursuant to 42 U.S.C. §1983 alleging their rights were violated by the defendants when the women were arrested for drug use while pregnant. The plaintiffs asserted ten claims: (1) violation of the right to privacy; (2) violation of the right to procreate; (3) violation of the Fourth Amendment; (4) violation of the Equal Protection clause based on gender discrimination; (5) violation of the Equal Protection clause based on racial discrimination; (6) violation of Title VI of the Civil Rights Act; (7) violation of the Federal Confidentiality Statute, 42 U.S.C. §290dd-2; (8) abuse of process; (9) violation of the Due Process clause of the Fourteenth Amendment; and (10) violation of the right to refuse medical treatment

The action came to trial before the court with a jury from November 20, 1996, to December 19, 1996. The court granted judgment as a matter of law for the defendants on the claims for intentional discrimination on the basis of gender, due process, right to refuse medical treatment, 42 U. S.C. §290dd-2, and abuse of

process. The court charged the jury on the plaintiffs' claims for violations of the Equal Protection clause and Fourth Amendment and the jury rendered a verdict in favor of the defendants on both claims. The court them too'-,-.. under advisement the claims for denial of the right to privacy, right to procreate, and Title VI. On August 13, 1997, the court denied the plaintiffs' request for injunctive relief in the right to procreate and right to privacy claims and allowed to parties to submit further briefs on the Title VI claim. The court has now considered the Title VI claim, After weighing the testimony of the witnesses, examining the exhibits introduced, and studying the applicable law, the court, pursuant to Rule 52 of the Federal Rules of Civil Procedure, hereby makes the following findings of fact and conclusions of law:

Findings of Fact

1. The plaintiffs are eight black women, one white woman, and one woman who is multiracial.

2. The defendants are either agencies of the State of South Carolina or agencies of political subdivisions thereof.

3. All of the plaintiffs presented at the Medical University of South Carolina ("MUSC") in Charleston, South Carolina for gynecological services. All of the plaintiffs either delivered children at MUSC or were treated postpartum at MUSC.

4. All of the plaintiffs except. Darlene Nicholson were arrested when the defendants discovered they were using drugs while pregnant. Instead of being arrested, Darlene Nicholson was involuntarily committed to MUSC's Institute of Psychiatry for drug treatment.

5. The catalyst for targeting these individuals was a policy designed to prevent cocaine abuse in pregnant women. During the fall of 1989, the defendants formulated a policy ("policy") for treating pregnant women who tested positive for cocaine at MUSC. The policy was not implemented at any other hospital in

Charleston by these defendants nor was it applied to women who were less than twenty-four weeks pregnant.

The policy identified probable drug abuse through screening all maternity patients who met certain criteria. A female patient was tested for cocaine through the use of a urine drug screen ("UDS") if she presented with one or more of the following symptoms: (1) *abruptio placentae*, or separation of the placenta from the uterine wall; (2) intrauterine fetal death; (3) no prenatal care; (4) late prenatal care; (5) incomplete prenatal care; (6) pre-term labor of no obvious cause; (7) history of cocaine use; (8) unexplained congenital anomalies; or (9) intrauterine growth retardation of no obvious cause.

6. If a patient tested positive for cocaine, an employee of MUSC would confront the patient and question her about her drug use. At some point thereafter, the positive results of the UDS were provided to the Ninth Circuit Solicitor's office or to the Charleston City Police Department. An officer of the latter then arrested the patient who had tested positive.

7. The policy was applied in all maternity departments at MUSC. Its goal was not to arrest patients but to facilitate their treatment and protect both the mother and unborn child.

8. Prior to 1990, if a patient tested positive for cocaine she was arrested without further ado. However, the defendants changed the policy in 1990 to give patients a choice to receive treatment for their drug use or be arrested and prosecuted under South Carolina law.

9. The large majority of MUSC's maternity patients are black. The maternity population at MUSC during the time period relevant to this action was approximately sixty-seven percent (67%) black and thirty-three percent (33%) white.

10. The racial composition of the women who tested positive for cocaine at MUSC during the period in question was approximately ninety percent (90%) black and ten percent (10%)

white. Of the thirty women who were arrested under the policy, ninety-six percent (96%) were black and four percent (4%) were white.

The plaintiffs' expert witness Dr. Martin Shapiro testified that the disparity of racial composition between the MUSC maternity population and the persons who tested positive for cocaine was roughly 5.54 standard deviations from chance. Such a deviation means that the likelihood that chance is the cause is less than I in 100,000. Dr. Shapiro explained that some reason other than chance must be the cause of the disparity.

The defendants' expert statistician Dr. McCabe testified that there was no statistically significant difference between the racial composition of the population of women who tested positive for cocaine and women who were arrested, and therefore no disparity exists between white and black patients in these two categories. According to Dr. McCabe there was no significant racial disparity in implementing MUSC's policy.

11. MUSC receives financial assistance from the United States Department of Health and Human Services to render health care. MUSC uses part of this financing in its OBGYN clinic to treat indigent patients. There is no evidence in the record that any other defendant receives relevant financial assistance from the United States.

Conclusions of Law

A. This court has jurisdiction pursuant to 28 U. S.C. § 13 3 1 (1994).

B. The plaintiffs brought this action in part under Title VI of the Civil Rights Act, Title 42, section 2000d. Section 2000d provides "[no] person in the United States shall on the ground of race, color, or national origin ... be subjected to discrimination under any program or activity receiving Federal financial assistance." Section 2000d-4a defines "program" to "mean all of the operations of... a department, agency, ... or other

instrumentality of the state ... or an entire corporation ... which is principally engaged in the business of providing ... health care ... any part of which is extended Federal financial assistance." Federal regulations provide that a state or its agency cannot "directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race...." 45 C.F.R. §80.3(b)(2) .

C. While Title VI itself only prohibits intentional discrimination, the regulations promulgated thereto clearly prohibit a state agency from administering a program which has a discriminatory impact on a protected person. Alexander v. Choate, 469 U.S. 287 (1985).

D. The plaintiffs bear the ultimate burden of persuading the court that the defendants' violated Title VI by establishing each of the following elements: (1) each defendant is an entity which receives funds from the federal government and is subject to the requirements of Title VI; (2) the plaintiffs are persons protected under Title VI and the regulations promulgated pursuant thereto; (3) the plaintiffs challenge a specific practice, procedure, or course of action of the defendants; and (4) the practice, procedure, or course of action of the defendants has an adverse discriminatory effect on the plaintiffs.

E. MUSC is the only defendant which has been shown to receive the requisite federal assistance. MUSC receives federal assistance from the Department of Health and Human Services and admits that it is subject to Title VI. Furthermore, the plaintiffs conceded at trial that MUSC is the only defendant subject to the requirements of Title VI.

F. Eight of the plaintiffs are black and therefore protected by the regulations promulgated under Title VI.

G. The plaintiffs challenge a specific practice, procedure, or course of action of the defendants. The plaintiffs challenge the following practices: (a) application of the policy only at MUSC;

(b) application of the policy only to certain parts of MUSC; (c) application of the policy only to cocaine; and (d) application of testing criteria that would inevitably result in testing more blacks.

H. The plaintiffs must prove. that the practice, procedure, or course of action caused the adverse discriminatory effect on them. Walls v. City of Petersburg, 895 F.2d 188 (4th Cir. 1990); Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993). For instance, the plaintiffs must show that the policy itself, as opposed to MUSC's general or maternity population, caused the disparate impact. None of the challenged practices, procedures, or courses of action of the defendants have an adverse discriminatory effect on the plaintiffs.

The plaintiffs introduced statistical evidence to prove their claim of disparity which the defendants countered with their own statistics. The evidence is conflicting, and the court concludes that the plaintiffs have not proven racial disparity through statistics. To do so, they must "offer statistical evidence of the kind and degree sufficient to show that the practice in question caused" the adverse impact on black patients. Elston, 997 F.2d at 1407 (emphasis added). In other words, the practice must affect black patients significantly more than white patients; if white patients are affected equally, then there is no disparate impact. Edwards v. Johnston County Health Dept., 885 F.2d 1215, 1223 (4th Cir. 1989). "The standard by which this greater adverse impact allegation must be tested is 'whether the policy in question had a disproportionate impact on the minorities in the total group to which the policy was applied.'" Edwards, 885 F.2d at 1223 (quoting Betsey v. Turtle Creek Associates, 736 F.2d 983, 987 (4th Cir. 1984)). Dr. Shapiro pointed to a large disparity between the MUSC maternity population and those who tested positive for cocaine, but the court concludes those are the wrong numbers to compare. To determine if the policy had an adverse impact on black women, one must compare the racial composition of women who tested positive for cocaine with those actually arrested, because the true impact of the policy was *the arrest,* not the UDS testing. Dr. McCabe testified there is no statistical difference between the racial composition of those two groups, and the court

agrees. Therefore, the plaintiffs have not shown a statistically significant disparate impact on black women in this case. Moultrie v. Martin, 690 F.2d 1078 (4th Cir. 1982).

Even though the plaintiffs have not proven a statistically significant disparate impact, the court has nevertheless considered each challenged practice *seriatim.* The plaintiffs first challenge the practice of employing the policy only at MUSC rather than at other hospitals in the Charleston, South Carolina metropolitan area, However, this challenge is irrelevant since MUSC is the only party subject to Title VI and MUSC cannot control or implement the policy at hospitals not controlled by MUSC. Therefore, the fact that the policy was not applied at other hospitals is not a practice that can be challenged under Title VI because it was not a practice administered by a defendant subject to Title VI.

The plaintiffs next challenge the practice of applying the policy only at certain discreet sections of MUSC As the court found above, the policy was applied at all maternity departments throughout MUSC, and the practice challenged by the plaintiffs did not exist and cannot be used to prove disparate impact.

The plaintiffs further challenge the practice of applying the policy only to cocaine users. They argue that cocaine is a drug preferred by blacks, and thus a policy isolating it would necessarily impact blacks. This argument fails for two reasons. First, the alleged disparate use of cocaine by blacks causes the disparate impact, not the isolation of cocaine by MUSC In this instance, the plaintiffs have not proven that the practice of the defendant causes the disparate impact. Secondly, the evidence shows that white cocaine users were treated the same as black cocaine users. If a patient had cocaine in her system, then she was given a choice of treatment or jail. No disparity exists in t that form of treatment.

Finally, the plaintiffs challenge the practice of employing subjective testing criteria. By targeting symptoms such as "no prenatal care" or "incomplete prenatal care" in deciding to test for drugs, MUSC allegedly targeted blacks because they typically

have no or incomplete prenatal care. The plaintiffs have offered little evidence to support the allegation that blacks typically have incomplete or no prenatal care. In fact, they offered the testimony of Dr. Chasnoff who testified that the criteria were medically senseless and merely a proxy for selecting black women. This testimony addresses the legal justification argument and is based solely on Dr. Chasnoff's opinion, not on statistical analysis. Furthermore, the plaintiffs argue that because the number of black women tested for drugs rose after the policy was implemented, the criteria must a fortiori disparately impact blacks.

The court finds these arguments unpersuasive. MUSC adopted these medially valid criteria to avoid the very subjectivity in testing about which the plaintiffs complain. The evidence presented by the defendants shows that whenever a patient presented with one of the criteria, they were tested. There is no evidence that the criteria were applied subjectively. The allegation that more black maternity patients may have taken cocaine into their systems than white maternity patients does not prove that the policy disparately impacted black women. The plaintiffs have failed to prove that the MUSC policy disparately impacts black women in violation of Title VI.

I. However, assuming *arguendo* that the plaintiffs have shown a prima facie case for disparate impact under Title VI, the defendants can meet and rebut the plaintiffs prima facie case by showing the following: (a) they had legitimate needs or goals; (b) the challenged practice, procedure, or course of action was necessary to meet those needs or goals; and (c) the practice, procedure, or course of act ion adopted by the defendants satisfied those needs or goals. The court concludes that the defendants have shown such.

J. MUSC officials stated that they implemented this policy to identify mothers who abused cocaine while pregnant and eliminate as far as possible the harmful effects of cocaine on fetuses. After implementing a protocol to test for illegal drugs, MUSC officials noticed an increase in the number of women who tested positive for those drugs Furthermore, many women were not

responding to MUSC requests to get help for their drug abuse. The policy at issue was then adopted and made mandatory throughout MUSC.

MUSC states that the policy isolates cocaine and is designed to get help to those who need it most: mothers abusing cocaine The criteria were developed based on symptoms MUSC officials knew were associated with Cocaine abuse, and made mandatory to supplant random or subjective application of UDS testing. These criteria limit testing to isolate potential problem patients for testing, and the UDS further narrows the field of potential patients. The court concludes that the policy was necessary to help cocaine-dependant mothers and their babies

and actually achieved hat goal as evidenced by he fact that a substantial majority of plaintiffs stopped abusing cocaine.

K. Since the defendants have rebutted the plaintiffs' prima facie case (if the same were in fact made out), the plaintiffs can only carry their ultimate burden of persuasion by demonstrating that other, less discriminatory practices would be as comparably effective as the challenged practice, but would result in less disproportionality. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 660-61 (1989); Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993). The plaintiffs propose the following procedures, practices, or courses of action would result in less disproportionality: (a) focussing on all illegal drugs and alcohol, not just cocaine; or (b) testing all maternity patients.

The criteria set out in the policy were developed to minimize the costs of testing, because focussing on all illegal drugs or testing all patients would be prohibitively expensive and a waste of resources. MUSC cannot afford to implement the policy as suggested by the plaintiffs because of the sheer number of patients they treat every year. "Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the [defendant's] legitimate ... goals." Wards Cove, 490 U.S. at 661. The court concludes these

alternatives suggested by the plaintiffs, while laudable goals, are not as comparably effective as the challenged practices of MUSC. Therefore, the plaintiffs have failed to carry their ultimate burden of persuasion as required by Title VI. Since the plaintiffs have not prevailed on this claim, the court hereby directs the clerk to enter judgment in favor of the defendants on the plaintiffs' claims brought pursuant to Title VI and the regulations promulgated thereunder and to dismiss this action with prejudice.[1]

AND IT IS SO ORDERED.

/s/
C. WESTON HOUCK
CHIEF UNITED STATES
DISTRICT JUDGE

Charleston, South Carolina
September 29, 1997

[1] The plaintiffs' motion to substitute parties filed on April 11, 1997 is rendered moot by this order.

EXCERPT OF TRANSCRIPT OF JURY CHARGE

[PAGE 17]

IN OTHER WORDS, THE EVIDENCE MUST AT LEAST REASONABLY LEAD YOU TO THE INFERENCE THAT THE DEFENDANTS POSITIVELY OR TACITLY CAME TO A MUTUAL UNDERSTANDING TO TRY TO ACCOMPLISH A COMMON AND IMPROPER PLAN.

LET'S LOOK MORE CLOSELY NOW AT THE CONSTITUTIONAL CLAIMS AND WHAT IS NECESSARY TO BE SHOWN FOR THERE TO BE A VIOLATION OF THE FIRST THE FOURTH AMENDMENT AND THEN NEXT THE FOURTEENTH AMENDMENT.

AS I STATED EARLIER, THE FOURTH AMENDMENT STATES IN PERTINENT PART THAT THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS AGAINST UNREASONABLE SEARCHES AND SEIZURES SHALL NOT BE VIOLATED. THE FOURTH AMENDMENT, WHICH I JUST READ, USUALLY FOCUSES ON POLICE ACTION. WHEN WE RUN INTO THE FOURTH AMENDMENT, WE ALMOST ALWAYS DO IT WHERE A POLICE OFFICER HAS MADE AN IMPROPER SEARCH OR AN IMPROPER SEIZURE OR PROPERTY. A SEARCH OR SEIZURE WITHOUT A WARRANT.

NORMALLY ON THE OTHER SIDE OF THE COIN, PERSONNEL WORKING IN A HEALTH CARE FACILITY, SUCH AS THE MEDICAL UNIVERSITY OF SOUTH CAROLINA, COULD ROUTINELY TEST A PATIENT'S

URINE OR TEST A PATIENT'S BLOOD OR PERFORM OTHER DIAGNOSTIC TESTS WITHOUT BEING SCRUTINIZED UNDER THE FOURTH AMENDMENT. BUT WHAT MAKES THIS CASE UNUSUAL AND WHAT BRINGS IT WITHIN THE COVERAGE OF THE FOURTH AMENDMENT IS THE FACT THAT YOU HAVE LAW ENFORCEMENT AND MEDICAL SERVICE PEOPLE ACTING TOGETHER.

IT IS THE FACT THAT THE SO-CALLED SEARCH, THE TAKING

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OF THE URINE SAMPLE AND THE TESTING OF IT FOR COCAINE, WAS TO BE USED NOT ONLY FOR MEDICAL DIAGNOSIS, BUT IF IT WAS POSITIVE IT WAS ALSO GOING TO BE USED FOR POLICE AND PROSECUTORIAL PURPOSES. IT IS THAT CONCERT, THAT JOINING TOGETHER BY THESE TWO GROUPS OF PEOPLE TO PERFORM THIS SEARCH THAT BRINGS IT WITHIN THE SCOPE OF THE FOURTH AMENDMENT.

THE FOURTH AMENDMENT SPEAKS OF UNREASONABLE SEARCH AND SEIZURES. USUALLY WHEN WE SPEAK OF UNREASONABLE SEARCHES AND SEIZURES WE ARE SPEAKING OF SEARCHES AND SEIZURES WHERE THERE IS NOT A SEARCH WARRANT. THERE ARE, HOWEVER, UNDER OUR LAW, A NUMBER OF RECOGNIZED EXCEPTIONS TO THAT RULE. THERE ARE A NUMBER OF CASES IN WHICH A WARRANTLESS SEARCH AND

SEIZURE CAN BE REASONABLE UNDER THE FOURTH AMENDMENT TO THE CONSTITUTION.

THERE WERE NO SEARCH WARRANTS IN THIS CASE. THERE WERE SOME SEARCH WARRANTS ISSUED LATER IN THE PROSECUTION TO OBTAIN MEDICAL RECORDS, BUT THERE WERE NO SEARCH WARRANTS ISSUED BY A MAGISTRATE OR ANY OTHER PROPER JUDICIAL OFFICER PERMIT THESE URINE SCREENS TO BE TAKEN. THERE NOT BEING A WARRANT ISSUED, THEY ARE UNREASONABLE AND IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES, UNLESS THE DEFENDANTS HAVE SHOWN BY THE GREATER WEIGHT OR PREPONDERANCE OF THE EVIDENCE THAT THE PLAINTIFFS CONSENTED TO THOSE SEARCHES.

NOW, THERE IS A LAW THAT HAS BEEN READ TO YOU HAVING TO DO WITH THE REPORTING OF CHILD ABUSE. IT'S SECTION

***

JOINT EXHIBIT #1

Joseph P. Riley, Jr.
Mayor

City of Charleston
South Carolina

Reuben M. Greenberg
Chief of Police

POLICE DEPARTMENT

TO: Central Detectives

FROM: Captain R. H. Roberts

SUBJECT: Operational Guidelines

DATE: 12 October 1989

Pregnant women abusing illegal drugs is a growing problem that poses potentially fatal consequences for the unborn child. This threat to human life has necessitated police intervention in those instances where pregnant females have rejected opportunities to voluntarily obtain assistance in stopping their abuse of dangerous drugs.

For the purpose of this memorandum, illegal drugs are defined as: heroin, crack/cocaine, amphetamines, and any other drug illegally ingested by the patient that medical authorities deem a threat to the life and safety of the unborn child.

Effective immediately, the operational guidelines listed below are to be followed when responding to complaints from MUSC personnel regarding drug abuse by pregnant women:

1. RECEIPT OF COMPLAINT

MUSC personnel will notify the Detective Division of drug abuse by pregnant women when:

a. the patient has tested positive for drug abuse and, after counseling and warning, has failed to keep

scheduled appointments for pre-natal care and/or substance abuse therapy. In this instance a criminal report will be made and an arrest warrant issued for the accused. Depending upon circumstances, the arrest warrant may be delivered to Sgt. J. Doyle, Warrants Division, for service.

b. the patient has tested positive a second time for drug use. In this instance the subject will be taken into custody immediately upon her medical release. Time constraints may dictate an arrest without warrant.

c. the patient delivers a child that tests positive for illegal drugs. In this instance a criminal report will be made and the arrest warrant served on the patient immediately after her medical release. DSS will be notified to take the newborn child into protective custody.

Aggravated circumstances and/or refusal by the patient to agree to voluntary assistance may justify arrest at the first report (1a) of drug abuse.

2. EVIDENCE

Probable cause to arrest is not limited to the presence of medical test results indicating the presence of illegal drugs in the patient's system. Written or oral statements made by the patient to third parties admitting use of illegal drugs is sufficient to justify an arrest.

Detectives must obtain copies of all medical records pertinent to the criminal charges when receiving complaints from MUSC personnel. It is also beneficial to obtain written documentation

that the patient's condition permits incarceration in a jail facility.

3. CHARGES TO BE FILED

The following criminal charges will be filed against arrestees:

a. if the pregnancy is 27 weeks or less -
Possession of _____
S.C. Code 44-53-370

b. if the pregnancy is 28 weeks or more -
Possession of _____
S.C. Code 44-53-370
AND
Distribution to persons under eighteen
S.C. Code 44-53-440

c. if the patient delivers while testing positive for illegal drugs and/or her newborn tests positive for drugs -
Unlawful neglect of a child
S.C. code 20-7-50

4. QUESTIONING OF SUSPECT

As in the case of all arrests, the suspect shall be questioned concerning the charges against her and a written record made of same. Every effort should be made to ascertain the identity of the subject who provided the illegal drugs to the suspect.

5. MUSC CONTACT

Ms. Shirley B. Brown, R.N.
Case Manager - Obstetrics
MUSC
792-2123

6. CASE ASSIGNMENT

Detective Geretha Waring will serve as the lead investigator in cases of this nature. Detectives I. Choice and Ruley Davis will assist her. MUSC personnel have been instructed to contact the police dispatcher and request a Crimes v. Persons detective for cases requiring immediate response after normal business hours.

cc: Chief Greenberg
Major Oliver
Sgt. Doyle
Solicitor Charles M. Condon
Ms. Shirley Brown, RN, MUSC√

***

JOINT EXHIBIT #2

POLICY M-7

MEDICAL UNIVERSITY OF SOUTH CAROLINA
MUSC MEDICAL CENTER POLICY MANUAL

SUBJECT: MANAGEMENT OF DRUG ABUSE DURING PREGNANCY

PURPOSE:

To ensure appropriate management of patients abusing illegal drugs during pregnancy.

POLICY:

Pregnant women abusing illegal drugs is a growing problem which poses potentially fatal consequences for the unborn child. This threat to human life has necessitated medical/police intervention in those instances where pregnant females have rejected opportunities to voluntarily obtain assistance in stopping their abuse of dangerous drugs.

PROCEDURE:
MUSC Medical Center staff will follow the following steps to identify/assist pregnant patients suspected of drug abuse:

I. Identification of Drug Abusers

Pregnancies to be screened by urine drug screens:

1. No prenatal care
2. Late prenatal care after 24 weeks gestation
3. Incomplete prenatal care
4. Abruptio placentae
5. Intrauterine fetal death
6. Preterm labor "of no obvious cause"

7. IUGR "of no obvious cause"
8. Previously known drug or alcohol abuse
9. Unexplained congenital anomalies

SUBJECT: MANAGEMENT OF DRUG ABUSE DURING PREGNANCY

B. Chain of custody will be followed on obtaining urine samples.

II. Education Efforts

A. Prenatal visit (initial to clinic) or initial hospitalization.

1. Video presentation of harmful effects of drug abuse during pregnancy.

2. Written statement from OB service regarding harmful effects of drug abuse during pregnancy (attached).

3. Statement to be signed by the mother, attesting that she has received counseling (attached).

B. Protocol for follow-up after identification of drug abuse during pregnancy by positive urine drug screen:

1. The Case Manager for OB or her designee will be notified by the resident of positive urine drug screen : on nights or holidays the Patient Care Coordinators will be notified.

2. Video presentation of harmful effects of drug abuse during pregnancy will be shown by nursing staff.

3. The Case Manager for OB or designee will give the written statement from OB service regarding harmful effects of drug abuse during pregnancy to the patient (attached).

4. Referral to Substance Abuse Clinic will be made by the OB Case Manager or designee and the OB clinic

Appointment will be made by the ward clerk. The OB Case Manager or designee will give the appointment letter to the patient (attached).

5. The OB Case Manager or designee will give the written statement from the solicitor's office to the patient (attached).

6. If any clinic appointments (substance abuse or OB Clinic) are not kept, the police department will be notified. Substance abuse will notify the police department for any substance abuse appointments missed or positive urine drug screens obtained by them (attached statement from Capt. Roberts).

7. If any further drug screens are positive, police department to be notified and patient will be arrested. (reference Capt. Roberts statement).

III. Protocol for follow-up after identification of drug abuse for patient who has delivered an infant:

1. Notify the OB Case Manager or designee: on nights, holidays, weekends, notify OB Patient Care Coordinator.

2. Notify police department (reference Capt. Roberts statement).

Date Originated:
Date Reviewed: 1/91, 3/93
Date Revised:
Committee Approved: 3/93

Legal Review Date: 3/93

Date Effective: 11/89, 3/93

MEDICAL DIRECTOR Date

SUBJECT: MANAGEMENT OF DRUG ABUSE DURING PREGNANCY

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MEDICAL UNIVERSITY OF SOUTH CAROLINA
Department of Obstetrics # Gynecology
Maternal and Fetal Medicine
(803) 792-2864

TO OUR PATIENTS:

171 Ashley Avenue
Charleston, South Carolina 29422-2233

The increasing use of street drugs, particularly Cocaine and crack, by pregnant women is a cause for great concern. The use of these drugs has been strongly associated with complications such as the death of the baby (stillbirth), premature delivery, bleeding due to the early separation of the afterbirth (abruption placenta), retarded growth and mental development of the baby, and birth defects. Drug abuse during pregnancy is also associated with withdrawal symptoms and sudden death (SIDS) of the infant. It is very important that you understand the risks, not only to yourself, but also to your unborn baby if you are using drugs during pregnancy.

If you are using drugs, please stop! If you are unable to stop, please let your doctor know. We want to help mothers get off drugs for the benefit of both you and your baby. We will provide you counseling about the harms of drug abuse and will make

arrangements for you to be seen at the Substance Abuse Clinic. We realize that drug abuse is a very difficult problem and we will do all that we can to help you.

If, however, we continue to detect evidence of drug abuse or a failure to follow recommended treatment, we will take action to protect your unborn child. The Charleston Police, the solicitor's office, and the Protective Service Division of DSS are also committed to the protection of unborn and newborn children from the harms of illegal drug abuse.

SUBJECT: MANAGEMENT OF DRUG ABUSE DURING PREGNANCY

Page 5 of 12

We hope that you can understand the tragedy which is being caused by the continued use of illegal drugs during pregnancy. This policy of providing warning, counseling and treatment for pregnant women using illegal drugs is the best way for us to help. For those women who fail this treatment, we must ask for help to protect the life and health of our most innocent unborn children.

Sincerely,

Department of Obstetrics and Gynecology
Medical University of South Carolina Medical Center

MUSC MEDICAL CENTER

I have seen a video on substance abuse and have been advised of the risks to myself and my baby. I understand that the MUSC Medical Center staff is willing to assist me in obtaining assistance for drug abuse treatment.

Patient's Signature:_____
Patient's Social Security Number:_____
Date:_____
Witness' Signature:_____

SUBJECT: MANAGEMENT OF DRUG ABUSE DURING PREGNANCY

MUSC MEDICAL CENTER

Date: _____

To: _____
(Patient's Name)

_____
(Patient's Social Security Number)

From: Medical University of South Carolina Medical Center

During your recent examination you tested positive for drugs. These drugs may cause immeasurable harm to your unborn child. We have made an appointment for you at our Prenatal Clinic at____o'clock on the ___ day of _____ 19 ___. We have also made an appointment for you with the Charleston County Substance Abuse facility at _____ at _____ o'clock on the ____ day of _____, 19 ____. We expect you to keep these appointments.

I have read and understand this and I agree to meet these appointments for my benefit and that of my unborn child.

_____ (L.S.)
Patient's Signature

_____
Witness' Signature

SUBJECT: MANAGEMENT OF DRUG ABUSE DURING PREGNANCY

THE STATE OF SOUTH CAROLINA
SOLICITOR, NINTH JUDICIAL CIRCUIT
CHARLESTON AND BERKELEY COUNTIES
County Court House
POST OFFICE BOX 58
CHARLESTON, S.C. 29402-0058
TELEPHONE: 803-723-6714

October 18, 1989

Reference: Substance Abuse During Pregnancy

TO WHOM IT MAY CONCERN:

During your recent examination you tested positive for drugs. You have been counseled about the harmful effects of drugs to you and your baby and referred to Substance Abuse and Pre-Natal Care by the Medical University. By these referrals you are being afforded an opportunity to rehabilitate yourself for the good of yourself and your baby. Please understand that by using drugs during pregnancy you are risking death or at least severe long-term harmful effects to your baby. If you fail to attend Substance Abuse and Pre-Natal care you will be arrested by Charleston City Police and prosecuted by the Office of Solicitor.

Sincerely yours,

Charles Molony Condon
Solicitor
CMC/aom

SUBJECT: MANAGEMENT OF DRUG ABUSE DURING PREGNANCY

I have read and received a copy of the above letter.

_____ _____

PATIENT WITNESS

DATE:_____ _____

WITNESS

SUBJECT: MANAGEMENT OF DRUG ABUSE DURING PREGNANCY

POLICE DEPARTMENT

TO: Central Detectives
FROM: Captain R. H. Roberts
SUBJECT: Operational Guidelines
DATE: 12 October 1989

Pregnant women abusing illegal drugs is a growing problem that poses potentially fatal consequences for the unborn child. This threat to human life has necessitated police intervention in those instances where pregnant females have rejected opportunities to voluntarily obtain assistance in stopping their abuse of dangerous drugs.

For the purpose of this memorandum, illegal drugs are defined as: heroin, crack/cocaine, amphetamines, and any other drug illegally ingested by the patient that medical authorities deem a threat to the life and safety of the unborn child.

Effective immediately, the operational guidelines listed below are to be followed when responding to complaints from MUSC personnel regarding drug abuse by pregnant women:

1. RECEIPT OF COMPLAINT

MUSC personnel will notify the Detective Division of drug abuse by pregnant women when:

a. the patient has tested positive for drug abuse and, after counseling and warning, has failed to keep scheduled appointments for pre-natal care and/or substance abuse therapy. In this instance a criminal report will be made and an arrest warrant issued for the accused. Depending upon circumstances, the arrest warrant may be delivered to Sgt. J. Doyle, Warrants Division, for service.

b. the patient has tested positive a second time for drug use. In this instance the subject will be taken into custody immediately upon her medical release. Time constraints may dictate an arrest without warrant.

c. the patient delivers a child that tests positive for illegal drugs. In this instance a criminal report will be made and the arrest warrant served on the patient immediately after her medical release. DSS will be notified to take the newborn child into protective custody.

Aggravated circumstances and/or refusal by the patient to agree to voluntary assistance may justify arrest at the first report (1a) of drug abuse.

2. EVIDENCE

Probable cause to arrest is not limited to the presence of medical test results indicating the presence of illegal drugs in the patient's system. Written or oral statements made by the patient to third parties admitting use of illegal drugs is sufficient to justify an arrest.

Detectives must obtain copies of all medical records pertinent to the criminal charges when receiving complaints from MUSC personnel. It is also beneficial to obtain written documentation that the patient's condition permits incarceration in a jail facility.

SUBJECT: MANAGEMENT OF DRUG ABUSE DURING PREGNANCY

Page 11 of 12

3. CHARGES TO BE FILED

The following criminal charges will be filed against arrestees:

a. if the pregnancy is 27 weeks or less - Possession of _____ S.C. Code 44-53-370

b. if the pregnancy is 28 weeks or more - Possession of _____ S.C. Code 44-53-370

AND

Distribution to persons under eighteen
S.C. Code 44-53-440

Central Detectives
12 October 1989
Page Three

c. if the patient delivers while testing positive for illegal drugs and/or her newborn tests Unlawful neglect of a child S.C. code 20-7-50

4. QUESTIONING OF SUSPECT

As in the case of all arrests, the suspect shall be questioned concerning the charges against her and a written record made of same. Every effort should be made to ascertain the identity of the subject who provided the illegal drugs to the suspect.

SUBJECT: MANAGEMENT OF DRUG ABUSE DURING PREGNANCY

5. MUSC CONTACT

Ms. Shirley B. Brown, R.N.

6. CASE ASSIGNMENT

Detective Geretha Waring will serve as the leas investigator in cases of this nature. Detectives I. Choice and Ruley Davis will assist her. MUSC personnel have been instructed to contact the police dispatcher and request a Crimes v. Persons detective for cases requiring immediate response after normal business hours.

cc: Chief Greenberg
Major Oliver
Sgt. Doyle
Solicitor Charles M. Condon
Ms. Shirley Brown, RN, MUSC

Date Originated:
Date Reviewed: 3/93
Date Revised:

Legal Review Date: 3/93

Date Effective: 3/93

MEDICAL DIRECTOR Date

***

JOINT EXHIBIT #15

Date: October 17, 1989
Subject: Policies concerning drug abusing pregnant women

On October 12, 1989 members of the Medical University of South Carolina, Charleston City Policy Department and the Solicitor's Office met to discuss forming a policy as it relates to dealing with pregnant women who abuse illegal drugs. In the past, officials as the Medical University tried to deal with this problem in-house through counseling and referrals to substance abuse and pre-natal care. Because it is a problem of enormous proportion the Medical University of South Caroline has enlisted assistance of the Solicitor's Office and Charleston City Policy Department.

As a result of the October 12th meeting we established the following guidelines of proposals:

1. That the Medical University of South Carolina will screen various obstetric admissions if they feel that the patient is in a risk category for abuse of illegal drugs.

2. That if the urine screen comes up positive for illegal drugs the patient will be counseled of the harmful effects of drugs to her baby, referred to substance abuse and scheduled for pre-natal care. If the patient attends substance abuse and pre-natal care and successfully completes same, there will be no arrest on said patient. On the other hand, if said patient does not attend and successfully complete substance abuse counseling and pre-natal care that patient will be arrested by Charleston City Police Department and prosecuted by the Solicitor's Office.

3. That if a patient comes into the Medical University of South Carolina and tests positive for a second time, the Medical University of South Carolina will contact the Charleston City Police Department and the Charleston

City Police Department will as soon as possible arrest said patient.

4. That if a patient delivers a child and the mother and/or child tests positive for illegal drugs the Medical University will contact the Charleston City Police Department and they will as soon as medically possible arrest said patient.

5. That the following criminal charges could apply:

   A. If the baby is yet unborn and not medically viable the mother could be charged with:

      1. Possession of controlled substance S.C. Code 44-53-370

   B. If the baby is yet unborn but medially viable the mother could be charged with:

      1. Possession of controlled substance S.C. Code 44-53-370

      2. Distribution to persons under eighteen S.C. Code 20-7-50

      3. Unlawful neglect of a child S.C. Code 20-7-50

   C. If the mother delivers and she and/or the newborn tests positive for drugs the mother could be charged with:

      1. Possession of controlled substance S.C. Code 44-53-370

      2. Distribution to persons under eighteen S.C. Code 20-7-50

3. Unlawful neglect of a child S.C. Code 20-7-50

5. That this written policy prepared by the Solicitor's Office is just a working draft and not a final draft. The intention of this policy is to protect children from their drug abusing mothers.

cc: Chief Greenberg Dr. Newman Ms. Shirley Brown
Captain Roberts Dr. Horger Joe Goode, Esquire
Solicitor Charles M. Condon

***

PLAINTIFF'S EXHIBIT #2

OFFICE OF THE GENERAL COUNSEL
(803) 792-4063

MEDICAL UNIVERSITY OF SOUTH CAROLINA
171 Ashley Avenue
Charleston, South Carolina 29425-1015

August 23, 1989

The Honorable Charles Condon
Solicitor, Ninth Judicial Circuit
2 Courthouse Square
Charleston, SC 29401

RE: Drug Positive Newborns

Dear Charles:

I read with great interest in Saturday's newspaper accounts of our good friend, the Solicitor for the Thirteenth Judicial Circuit, prosecuting mothers who gave birth to children who tested positive for drugs. Evidently the solicitor is prosecuting under the abuse and neglect statute. As you can imagine, MUSC Medical Center has a substantial number of newborns who do test positive to drugs, especially cocaine and heroin. If a child is born dead, this death is immediately reported to our medical examiner who orders an autopsy. In other cases where the children survive, these cases are referred to DSS for home evaluation and assistance to the mother.

Please advise us if your office is anticipating future criminal action and what if anything our Medical Center needs to do to assist you in this matter.

Sincerely,
/s/
Joseph C. Good, Jr.
General Counsel

JCG,JR/mrr

Received
Aug 24, 1989
SOLICITOR
9TH CIRCUIT

***

PLAINTIFF'S EXHIBIT #6

State of South Carolina
NINTH JUDICIAL CIRCUIT
OFFICE OF THE SOLICITOR
CHARLES MOLONY CONDON
Solicitor

Charleston County
Courthouse
Post Office Box 58
Charleston, SC 29402
Phone: 803-723-5714

Berkeley County
Courthouse
300 California Avenue
Moncks Corner, SC 29461
Phone: 803-723-0269

August 31, 1989

The Honorable Reuben Greenberg
Chief, Charleston Police Department
180 Lockwood Boulevard
Charleston, South Carolina 29403

Dear Reuben:

Since both our schedules seem to be particularly demanding this week, I thought perhaps I would communicate my thoughts to you via this letter.

The attached letter concerns the forming of a task force to consider possible prosecution of the mothers of drug affected babies also known as "crack babies." What I would ask you to consider is the co-chairing of this group with me.

I am the process of making arrangements with the Medical University for a date and meeting space. In attendance, I anticipate a relatively small group of professionals representing the Department of Social Services, the Medical University, the Drug Rehabilitation Program, the City Police, and the Office of Solicitor. Specifically, I have thought of including Dr. James Edwards, President, Medical University of South Carolina, Dr. Charles Darby, Professor and Chairman of the Department of

Pediatrics, Dr. Abner Levkoff, Professor of Pediatrics, Dr. Sarah Schuh, Assistant Professor of Pediatrics, Dr. Sandra Conradi, Chief Medical Examiner, Ms. Lynn Fredericks, Director of Social Work, Medical University of South Carolina, Joseph C. Good, Jr., General Counsel, Medical University of South Carolina, Mr. Frank Johnson, Executive Director, Charleston County Substance Abuse Commission, Mr. William Knowles, Director, Department of Social Services, Ms. Nancy Worley, Program Director, Department

The Honorable Reuben Greenberg
August 31, 1989

page two continued

of Social Services, Francis Cornley, Assistant Solicitor for Child Abuse, and Ms. Cindy Legare, Investigator for Child Abuse, Ninth Judicial Circuit. Please feel free to add any individuals that you think would be pertinent to our topic or delete any names that possibly could be unnecessary. In such a meeting we can become aware of each organization's position and get their input in forming a policy regarding the prosecution of the mothers.

Please let me know if you are interested. The tentative date for the meeting is Wednesday, September 20th at 10:00 am in the Vice-President's Conference Room which I understand is adjacent to the President's offices. If it is agreeable and you wish to co-host this meeting, I will forward the letters to you by courier for your signature. It is my hope that we can get this going by mid-September.

I look forward to hearing your response. Since this is a particularly busy time, please do not feel that it is necessary to respond by letter. Just call my secretary and she will be glad to relay your decision to me.

With my very best regards, I remain

Sincerely yours,
/s/
Charles Molony Condon
Solicitor

CMC/gf

P.S. I would like to add my hearty congratulations on your most recent award. Certainly, it nice to be so honored and even nicer to have a tangible reward!

***

PLAINTIFF'S EXHIBIT #28

Office of the General Counsel

Medical University of South Carolina
171 Ashley Avenue
Charleston, South Carolina 29425-1015

December 19, 1989

Pat Hudson, Esq.
Senior Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

RE: MUSC - Policy on Management of Drug Abuse During Pregnancy

Dear Pat:

I hope this letter finds you and your family well and ready for an enjoyable Christmas and a very prosperous New Year.

I have taken the liberty of enclosing The Medical University of South Carolina's newly enacted policy for the management of drug abuse during pregnancy. As you know the numbers of expectant mothers giving birth to drug addicted babies has increased drastically within the last few years. Babies born to mothers who have taken or used cocaine or other type drugs during pregnancy are usually born premature and their chance of survival is quite slim. Those children that do survive are frequently, severely mentally or physically handicapped and many continue to be wards of the state.

Several months ago we were contacted by Solicitor Condon who wanted to meet with representatives of the medical profession, the drug abuse counsellors, social workers, and law enforcement to educate each other as to the seriousness and

severity of this problem and to plan a united action to address it. At the suggestion of law enforcement and the solicitor's office and armed with Section 20-7-510 of The South Carolina Code of Laws, The Medical University of South Carolina was asked to develop and implement a management program for expectant mothers who tested positive to cocaine or other similar drugs. This policy was not intended to be punitive and was not to be employed in a discriminatory matter.

"An equal opportunity m/f affirmative action employer"

Pat Hudson, Esq.
December 19, 1989
Page 2

Expectant mothers admitted to our facilities who met a certain profile based on our medical experience were determined to have given reasonable cause to medical officials to do a blood screen on the patient pursuant to the blanket consent form signed by that patient upon entry into our facilities. If the test returned positive for cocaine or similar drugs the mother was informed that she must attend prenatal counselling and an appointment was made for her at the Charleston County Substance Abuse facility. The patient is shown a videotape as to the dangers of cocaine use and its affect on unborn children and she signs a form verifying that she has viewed the video on substance abuse and has been advised as to the risk to her and her baby by medical personnel of The Medical University of South Carolina. She further signs an acknowledgement of when of when her appointment with the prenatal clinic will be and her appointment with the Charleston County Substance Abuse agency. She is further given a directive by Captain R. H. Roberts of the Charleston Police Department informing her of the criminal aspects of her cocaine use and a copy of the pertinent statute. She is also given and signs for a warning from Solicitor Condon as to the importance of her attending the prenatal and drug abuse facility and the danger to herself and her child should she not follow this preventative program.

If the woman refuses to attend the prenatal care and/or the Charleston County Drug Abuse classed such non-attendance is reported to the Charleston Police Department or the Charleston County Police Department and appropriate legal action is taken from that point.

This is not a perfect program and I would prefer to have the mother sign an informed consent for drug screen and for the same procedure to be used on her child. I would also prefer that DSS be notified rather than law enforcement but the reality is that DSS cannot, at this time, handle the volume of this type of case. Notices sent to DSS over the past twelve months have not been satisfactorily addressed.

The other weakness in this program is that although we do test children who are referred from other facilities as well as their mothers if they meet the profile, the main prosecutions have been against black indigent mothers in the Charleston area which, to the uneducated observer would appear to be discriminatory.

Pat Hudson, Esq.
December 19, 1989
Page 3

I am aware that Greenville Memorial Hospital has a similar program and I would be curious to know whether they have encountered any objections to their program.

Sincerely,
/s/
Joseph C. Good, Jr.
General Counsel

JCG,JR/mrr
Enclosures

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EXCERPT FROM PLAINTIFFS' EXHIBIT #105

Welcome To The
MUSC Medical Center

Patient Information
Handbook

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PATIENT'S RIGHTS AND RESPONSIBILITIES (PAGE 21)

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[excerpt from page 22]

RIGHT TO PRIVACY

You can expect consideration for your right to privacy and confidentiality concerning medical care. Medical records and all communication pertaining to your care are also treated as confidential. Access to your medical records is available to you and can be requested from your attending physician.

***

EXCERPTS FROM TESTIMONY OF SHIRLEY BROWN, R.N.

[BROWN 4]

A. NO, IT'S NOT.
Q. YOU ARE, HOWEVER, A REGISTERED NURSE, ARE YOU NOT?
A. YES, I AM.
Q. IN THE FALL OF '89, YOU HAD BEEN EMPLOYED BY THE MEDICAL UNIVERSITY OF SOUTH CAROLINA FOR HOW LONG?
A. I STARTED TO WORK FOR THE MEDICAL UNIVERSITY IN 1985.
Q. SO YOU HAVE BEEN THERE APPROXIMATELY FOUR YEARS?
A. I WAS AT THE COLLEGE OF NURSING FIRST AND THEN MOVED INTO THE HOSPITAL.
Q. MS. BROWN, SOMETIME IN THE LATE SUMMER OR EARLY FALL OF '89 YOU HEARD A RADIO BROADCAST, DIDN'T YOU, ABOUT A PARTICULAR POLICY TAKING PLACE IN ANOTHER LOCATION IN SOUTH CAROLINA?
A. YES, I DID.
Q. AND THAT POLICY EFFECTIVELY IN SUMMARY WAS USING THE PROSECUTORIAL PROCESS TO ADDRESS SUBSTANCE ABUSE AMONG PREGNANT WOMEN?
A. THE NEWS I HEARD IS THAT ACCORDING TO THE SOUTH CAROLINA LAW, THAT WOMEN WERE BEING ARRESTED FOR CHILD ABUSE.
Q. IN WHERE?
A. IN GREENVILLE, SOUTH CAROLINA.

Q. HAVING HEARD THAT, WHILE DRIVING INTO WORK, MS. BROWN, YOU WENT TO THE OFFICE OF MR. GOOD, WHO IS THE GENERAL COUNSEL OF THE UNIVERSITY, DIDN'T YOU?
A. NO, I DID NOT.

[BROWN 5]

Q. YOU WROTE TO HIM? YOU CALLED HIM?
A. MR. GOOD AND I JUST HAPPENED TO BE WALKING IN TOGETHER THAT MORNING.
Q. EXCUSE ME, MY MISSTATEMENT. BUT YOU HAD THAT MORNING A CONVERSATION WITH GENERAL COUNSEL FOR THE MEDICAL UNIVERSITY OF SOUTH CAROLINA CONCERNING THAT POLICY, DIDN'T YOU?
A. YES, I DID.
Q. AS A RESULT OF THAT MEETING OR THAT CONVERSATION WITH MR. GOOD, THERE WAS EVENTUALLY, BUT NOT TOO LONG OFF, A MEETING SCHEDULED AMONG, AMONG OTHERS, THAT IS I DON'T MEAN TO BE ALL INCLUSIVE, MR. GOOD, COUNTY SOLICITOR CONDON, CHARLESTON POLICE CHIEF RUEBEN GREENBERG AND SOME MEMBERS OF THE OBSTETRICAL STAFF, MEDICAL STAFF OF THE MEDICAL UNIVERSITY OF SOUTH CAROLINA TO DISCUSS THIS ISSUE? FAIR?
A. THERE WAS ONLY ONE PERSON THERE FROM OB. THERE WERE MORE PEOPLE FROM NEONATOLOGY AND THE DEPARTMENT OF SOCIAL SERVICES AND THE CHARLESTON COUNTY SUBSTANCE ABUSE.

Q. AND THE OTHER PEOPLE I MENTIONED, SOLICITOR CONDON, CHIEF GREENBERG, MR. GOOD, YOURSELF?
A. RIGHT.
Q. FROM THAT MEETING -- AND BY THE WAY, APPROXIMATELY WHEN WAS THAT MEETING?
A. IT OCCURRED THE MONDAY BEFORE HUGO.
Q. I APOLOGIZE TO YOU, BUT I DON'T LIVE IN SOUTH CAROLINA, YOU'LL HAVE TO REFRESH ME AS TO WHEN THAT WAS?

***

[BROWN 28]

WITNESS WHAT HAS BEEN MARKED AS EXHIBIT 106. PLAINTIFF'S 106 FOR TRIAL FOR IDENTIFICATION ONLY. I'M SHOWING MY ADVERSARY
(PAUSE IN PROCEEDINGS.)
MR. HOOD: YOUR HONOR, AS TO THIS EXHIBIT WE HAVE AN OBJECTION TO ITS RELEVANCY.
THE COURT: LET ME SEE IT.
MR. WHERRY: I'M NOT OFFERING IT YET.
THE COURT: IF YOU'RE NOT OFFERING IT.
MR. WHERRY: NO, SIR, I'M NOT. I WANT TO SHOW IT TO THE WITNESS TO SEE IF SHE CAN MAKE IT RELEVANT.
Q. (BY MR. WHERRY, CONTINUING) MS. BROWN, YOU REFERRED TO EARLIER IN YOUR TESTIMONY A WRITING OF FIRST DRAFT OF A POLICY.
MS. BROWN, LET ME WITHDRAW THAT QUESTION AND I'LL

LEAVE THE DOCUMENT THERE WITH YOU FOR A MOMENT. IT'S NOT WHAT I THOUGHT IT WAS.

DID THERE COME A POINT IN TIME, MS. BROWN, AT WHICH -- AT WHICH YOU ATTENDED OR PARTICIPATED IN ANOTHER MEETING, A FURTHER DEVELOPMENT OF WHAT I WILL CALL THE INTERAGENCY POLICY?

A. YES IT WAS.

Q. WITH RESPECT TO THE ONE THAT WAS ADOPTED IN OCTOBER OF '89, WERE THERE A LIST OF CRITERIA THAT WOULD LEAD TO THE HOSPITAL OBTAINING A UDS, URINE DRUG SCREEN?

A. YES, IT WAS.

[BROWN 29]

Q. AND WOULD YOU TELL THE JURY, PLEASE, WHAT THOSE CRITERIA WERE THAT WOULD LEAD TO THE HOSPITAL RUNNING A UDS, A URI DRUG SCREEN?

A. A PERSON HAD NO PRENATAL CARE.

Q. NO PRENATAL CARE?

A. CORRECT. IF THEY HAD LATE PRENATAL CARE, THAT AFTER 24 WEEKS GESTATION.

Q. LATE PRENATAL CARE?

A. IF THEY HAD INCOMPLETE PRENATAL CARE, I.E., THEY CAME ONE VISIT AND THEN DIDN'T COME BACK UNTIL JUST BEFORE THE DELIVERED.

Q. INCOMPLETE PRENATAL CARE.

A. IF THEY CAME IN WITH AN ABRUPTIO PLACENTAE, THAT IS WHENEVER THE PLACENTAE SEPARATES FROM THE INSIDE OF THE UTERUS WHICH CAN CAUSE THE BABY TO DIE AND OR PUT THE MOTHER'S HEALTH IN SERIOUS JEOPARDY.
IF SHE CAME IN AND HER BABY HAD DIED INSIDE OF HER KNOWN AS INTRAUTERINE FETAL DEATH.
Q. MS. BROWN, I PROMISE YOU I'M GOING TO LET YOU CONTINUE WITH THAT. WITH THE INTRAUTERINE FETAL DEATH THAT WOULD TRIGGER A UDS?
A. YES, IT WOULD
Q. IF THE IF THERE WAS INTRAUTERINE FETAL DEATH, THE HOSPITAL, I TAKE IT THE HEALTH CARE PROFESSIONALS HAD NO FURTHER INTEREST IN PROTECTION OF THE FETUS, DID THEY? THE

[BROWN 30]

BABY'S DEAD, THEY HAD NOTHING LEFT TO PROTECT, RIGHT?
A. BUT OUR URINE DRUG SCREENS WERE DONE TO LOOK FOR REASONS.
Q. I UNDERSTAND. CONTINUE WITH YOUR LIST AND THEN LET US RETURN TO THAT.
A. IF THEY WERE IN PRETERM LABOR.
Q. PRETERM LABOR.
A. IF -- AND OF NO OBVIOUS CAUSE. IF A LADY HAD TWINS, TRIPLETS, A LONG HISTORY OF CERVICAL INCOMPETENCE OR SOMETHING LIKE THAT, SHE MIGHT NOT BE SCREENED.

INTRAUTERINE GROWTH RETARDATION. THAT'S WHEN THE
BABY IS NOT THE SIZE THAT IT SHOULD BE AND THERE WAS NO
OBVIOUS CAUSE FOR THAT.
AND UNEXPLAINED CONGENITAL ANOMALIES.
WHICH I TAKE IT MEANS A BIRTH DEFECT?
A BIRTH DEFECT.
OKAY. NOW, MS. BROWN, LET'S GO BACK TO THAT INTRAUTERINE
FETAL DEATH. AND IN CONJUNCTION WITH THAT THE INTENT OF THE
POLICY, THE REASON THAT WE DECIDED ON THIS POLICY, AT THE
FIRST MEETING, WAS BECAUSE OF OUR CONCERN, AND AS MR. HOOD
SAID IN HIS OPENING, FOR THE HEALTH AND SAFETY AND CARE OF
THESE FETUSES AND SOON TO BE CHILDREN; FAIR?
A. THAT IS CORRECT.
Q. SO, HOW DID A TAKING A URINE SAMPLE FROM THE MOTHER OF A
CHILD WHO WAS ALREADY DEAD, HOW DID THAT PROTECT UNBORN
CHILDREN? IT DIDN'T, DID IT?

***

EXCERPTS FROM TESTIMONY OF IRA J. CHASNOFF

[CHASNOFF 13]

A. THOSE OUTCOMES, YOU KNOW, SUPPOSEDLY WAS TO IMPROVE THE HEALTH AND WELL-BEING OF THE CHILD.

Q. ARE THERE ANY MEDICAL LISTS INVOLVED IN JUST FOCUSING ON COCAINE TO THE EXCLUSION OF PERHAPS OTHER SUBSTANCES THAT MIGHT CAUSE HARM BY PRENATAL EXPOSURE?

A. JUST PURELY FROM A BIOLOGICAL ASPECT, LOOKING AT THE HEALTH ASPECT, WE HAVE DONE STUDIES, EXTENSIVE NUMBERS OF WOMEN WHO ARE USING COCAINE NOW. AND WHAT OUR STUDY SHOW, FOR INSTANCE IF YOU LOOK AT ALL OF THE DIFFERENT DRUGS THAT WOMEN MIGHT TAKE, TOBACCO AND CIGARETTE SMOKING HAS THREE TIMES A GREATER IMPACT ON PRODUCING LOW BIRTH WEIGHT THAN DOES COCAINE.

WE KNOW LOW BIRTH WEIGHT, A BABY BEING BORN WEIGHING LESS THAN FIVE POUNDS EIGHT OUNCES, PUTS THAT BABY AT GREAT RISK FOR DEATH AND FOR ILLNESS. SO THAT IF YOU REALLY WANT TO IMPROVE THE OUTCOME OF THE CHILD, YOU WOULD DEVELOP PROGRAMS TO HELP WOMEN STOP SMOKING DURING PREGNANCY IF YOU WERE GOING TO FOCUS ON ONLY ONE DRUG. FROM PURELY A MEDICAL PROSPECTIVE YOU WOULD FOCUS ON TOBACCO AND NOT COCAINE.

Q. IS THERE ANYTHING UNIQUELY HARMFUL ABOUT COCAINE IN TERMS OF PRENATAL EXPOSURE?
A. COCAINE IS UNIQUE IN THAT IT HAS A VERY DIRECT EFFECT AND SUDDEN EFFECT. BUT IT IS NOT UNIQUE IN THE FACT THAT THERE ARE OTHER DRUGS THAT ACT IN ALMOST EXACTLY THE SAME WAY. AN EXAMPLE IS AMPHETAMINES, IF A WOMEN USES AMPHETAMINES DURING

[CHASNOFF 14]

PREGNANCY SHE GETS SOME OF THE EXACT SAME OUTCOMES IN THE SAME TIME SEQUENCE, SO THAT AGAIN JUST FOCUSING ON COCAINE IS NOT POLICY THAT MOVES YOU TOWARD WHAT WAS THE STATED OUTCOME, IMPROVING THE HEALTH OF THE CHILD.
WHAT IS AN AMPHETAMINE?
A. OH, AMPHETAMINES, ON THE STREET THEY'RE CALLED SPEED. BACK IN THE FIFTIES WHEN WOMEN WERE GIVEN DIET PILLS, THOSE WERE AMPHETAMINES. AMPHETAMINES, ANOTHER FORM OF AMPHETAMINE IS RITALIN, SO THEY CAN BE USED MEDICALLY AS PRESCRIPTIONS BUT ABUSE OF AMPHETAMINES AND THE CURRENT RAGE ACROSS THE COUNTRY IS CALLED ICE. PEOPLE ARE COOKING AMPHETAMINES, MAKING HOMEMADE AMPHETAMINES. THEY HAVE A DEVASTATING EFFECT ON PREGNANCY OUTCOME.
Q. AND WHAT WOULD THAT BE?

A. WELL, AMPHETAMINES CAN CAUSE MANY OF THE SAME THINGS THAT COCAINE DOES, ABRUPTIONS, SUDDEN SEPARATION OF THE PLACENTA FROM THE WALL OF THE UTERUS SO THE BABY CAN BLEED OR MOTH CAN BLEED TO DEATH. AMPHETAMINES CAUSE PREMATURITY, THEY CAN BE RELATED TO -- MANY OF THE SAME KIND OF THINGS THAT ARE ASSOCIATED WITH COCAINE.
THE DIFFICULTY AGAIN WITH AMPHETAMINES, JUST LIKE WITH COCAINE, YOU CAN'T SPECIFICALLY DIFFERENTIATE, YOU CAN'T SAY THIS IS DUE TO AMPHETAMINES AND COCAINE CAUSES THIS. IT'S PEOPLE WHO USE DRUGS, USE MULTIPLE DRUGS. YOU DON'T FIND ANYBODY USING ONE DRUG.

[CHASNOFF 15]

Q. IS THE PRENATAL EXPOSURE TO A FETUS OF AN ILLEGAL DRUG THE SAME THING AS THE HARM FROM THAT? IS THERE A DISTINCTION BETWEEN THOSE THINGS?
A. WELL, AGAIN THERE IS NO ONE-TO-ONE BASIS. IN FACT IN OUR STUDIES, AGAIN LOOKING AT LOTS AND LOTS OF BABIES, IF YOU LOOK AT PURELY JUST THE MEDICAL OUTCOME NOW OF ALL OF THE BABIES WE HAVE STUDIED WHOSE MOTHERS USED COCAINE DURING THE PREGNANCY, ABOUT 25 PERCENT OF THE BABIES HAVE SOME KIND OF EFFECT. 70

PERCENT OF THE BABIES THERE DOES NOT APPEAR TO BE ANY IMMEDIATE EFFECT.

SO AGAIN IF YOU'RE LOOKING AT THE IMMEDIATE OUTCOME AT THE TIME OF BIRTH IT'S 25, 75 SPLIT. SO THE MAJORITY OF BABIES DON'T SHOW IMMEDIATE OUTCOMES.

Q. FROM THE EXPOSURE TO COCAINE?

A. FROM EXPOSURE TO COCAINE.

Q. WERE YOU FAMILIAR WITH THE MEDICAL CRITERIA THAT WERE USED IN THE POLICY TO INSTIGATE THE INITIAL UDS?

A. I'M FAMILIAR WITH THE CRITERIA THAT WERE ESTABLISHED. AS I RECALL THOSE CRITERIA CHANGED A LITTLE BIT OVER THE YEARS, BUT I AM FAMILIAR WITH THEM.

AND HOW DID THOSE CRITERIA RELATE TO THE STATED GOAL OF MATERNAL AND FETAL HEALTH?

A. WELL, IF YOU LOOK PURELY AT THE MEDICAL, THERE WERE A LIST OF, I THINK IT WAS ABOUT 7 CRITERIA IF I RECALL. IF YOU LOOK AT THE PURELY MEDICAL PERSPECTIVES, FOR INSTANCE ONE OF

[CHASNOFF 16]

THE CRITERIA WAS PREMATURE DELIVERY. ANOTHER WAS ABRUPTION. SO, IF A WOMEN HAS ONE OF THOSE OUTCOMES, THAT COULD BE AN INDICATION THAT SHE USED COCAINE.

BUT, TOBACCO ALSO CAUSES ABRUPTION. TOBACCO ALSO

CAUSES PREMATURITY. SO THAT SETTING UP CRITERIA THAT CAN BE
RELATED TO A WIDE RANGE OF PROBLEMS, INCLUDING TOBACCO USE.
BUT THEN NARROWING IT DOWN AND SAYING THIS IS WHAT -- THIS IS
DUE TO COCAINE, YOU JUST CAN'T DO THAT. I MEAN, IT DOESN'T
MAKE MEDICAL SENSE.
THEN THERE WERE SOME CRITERIA IN -- THAT WERE SET UP
THAT REALLY SET UP A VERY BIASED PICTURE. WHEN YOU USE
SOMETHING LIKE NO PRENATAL CARE OR INADEQUATE PRENATAL CARE
AND SAY THAT'S WHAT WE'RE GOING TO BASE THIS POLICY ON, WHAT
YOU HAVE DONE IS SET UP A CERTAIN POPULATION OF WOMEN TO BEAR
THE BRUNT OF THAT POLICY, BECAUSE WHEN A WOMEN RECEIVES NO
PRENATAL CARE --
WELL, LET'S GO-AT IT FROM THE OTHER DIRECTION.
POVERTY PLACES A WOMEN ON THE EDGE OF THE HEALTH CARE SYSTEM
WE KNOW THAT. WOMEN WHO ARE POOR HAVE VERY LITTLE ACCESS TO
PRENATAL CARE. SO THAT IF YOU SAY, WELL, YOU DIDN'T GET
PRENATAL CARE AND SO WE'RE GOING TO TEST YOUR URINE FOR DRUGS
WHAT YOU'RE ALSO SAYING IS, YOU'RE POOR, WE'RE GOING TO TEST
YOUR URINE FOR DRUGS. BECAUSE THE POORER YOU ARE THE MORE
LIKELY IT IS YOU'RE NOT GOING TO HAVE ACCESS TO PRENATAL

CARE. SO YOU GET INTO THIS CYCLE WHERE YOU'RE SELECTING OUT

[CHASNOFF 17]

SPECIFIC GROUP OF WOMEN TO BE TESTED. NOW, THAT -- THAT IS -- THAT'S KIND OF THE STARTING POINT. BUT THEN WE HAVE DONE STUDIES AND FOLLOWING UP TO THAT THAT HAVE SHOWN THAT WHEN YOU SET UP THESE KIND OF PUNITIVE POLICIES, YOU DO SELECT OUT WOMEN WHO ARE POOR AND MINORITY WOMEN AND THE IMPLEMENTATION OF THOSE POLICIES.

Q. COULD YOU BEEN MORE SPECIFIC ABOUT WHAT YOU'RE TALKING ABOUT IN TERMS OF RESEARCH?

A. YEAH. WE PUBLISHED AN ARTICLE IN 1990 IN THE NEW ENGLAND JOURNAL OF MEDICINE, WE WERE ASKED TO COME DO A STUDY IN THE STATE OF FLORIDA IN THE PLACE CALLED PINELLAS COUNTY ON THE WEST COAST OF FLORIDA. BECAUSE THEY, ALTHOUGH THEY SAW THEMSELVES AS A VERY STABLE, MIDDLE-CLASS POPULATION, THEY WERE SEEING A NUMBER OF INFANTS WHO THEY THOUGHT MET THE CRITERIA OF HAVING BEEN EXPOSED TO DRUGS DURING PREGNANCY. SO THEY ASKED US TO DO A STUDY OF THE SITUATION.

SO, THE STUDY WAS SET UP TWO PARTS. THE FIRST PART OF IT WAS EVERY WOMEN IN PINELLAS COUNTY WHO WENT FOR HER

FIRST PRENATAL VISIT GOT A URINE TOXICOLOGY. THOSE URINES WERE SENT TO US IN CENTRAL LABS AND TESTED WITHOUT ANY NAMES, IT IS WHAT WE CALL BLINDED, YOU COULDN'T TELL WHOSE URINE WAS WHOSE BUT WE FOUND THAT THE RATE -- WE FOUND AN OVERALL RATE OF POSITIVE URINES FOR ILLEGAL DRUGS OF ABOUT 14 TO 15 PERCENT. WHEN WE LOOKED AT THE WOMEN IN THE PRIVATE HEALTH

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[CHASNOFF 42]

MAY NOT BE THE DRUG USE ITSELF, IS WHAT I AM TRYING TO SAY.

Q. IN ONE OF YOUR ARTICLES DID YOU DESCRIBE ONE OF THE SIGNS THAT A PREGNANT WOMEN MAY BE USING SUBSTANCE ABUSE TO BE THAT SHE DELAYED GETTING PRENATAL CARE?

A. THAT IS A RETROSPECTIVE STUDY, YES.

Q. DR. CHASNOFF, IN 1989 YOU TESTIFIED BEFORE CONGRESS ABOUT THE MEDICAL CRISES POSED BY COCAINE USE DURING PREGNANCY, DID YOU NOT?

A. I DID TESTIFY BEFORE CONGRESS. I'M NOT -- I DON'T RECALL I SAID MEDICAL CRISES, BUT ---

Q. YOU DID SAY ---

A. I --

Q. I'M SORRY.

A. I DON'T REMEMBER WORDS.

Q. YOU DID SAY THAT THERE WAS AN URGENT NEED TO ESTABLISH PROTOCOLS FOR EARLY RECOGNITION OF SUBSTANCE-ABUSING WOMEN AND PROVIDING TREATMENT AND INTERVENTION PROGRAMS?

A. I DID SAY THAT, YES.

Q. YOU ALSO TESTIFIED THAT THERE HAD BEEN A RAPID RISE IN REPORTED INSTANCES OF COCAINE USE DURING PREGNANCY, DID YOU NOT?

A. YES.

Q. AND THAT IN 1989 SUBSTANCE ABUSE WAS ASSOCIATED WITH APPROXIMATELY 64 PERCENT OF ALL REPORTED CHILD ABUSE CASES?

A. THAT'S RIGHT.

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EXCERPTS FROM TESTIMONY OF FRANCIS J. CORNELY

[CORNELY 321]

MS. DUNN: OBJECTION AGAIN.
THE COURT: AGAIN, I DON'T THINK YOU HAVE LAID A PROPER FOUNDATION. JUST BECAUSE HE WENT OVER THERE ONE TIME, I DON'T THINK THAT'S ENOUGH.
Q. (BY MS. COMPANION, CONTINUING) INVOLVEMENT, MR. CORNELY?
A. I OBVIOUSLY WROTE SOME MEMOS AND A LETTER, BUT I DON'T HAVE ANY INDEPENDENT RECOLLECTION OF ANYTHING ELSE THAT I DID TOWARD THAT BECAUSE, AGAIN, I LEFT SHORTLY THEREAFTER.
Q. IS IT FAIR TO SAY THAT YOU WERE INVOLVED WITH THE -- SOME ASPECT OF THE FORMULATION OF THE POLICY?
A. YES.
Q. AND FROM THAT DID YOU GAIN AN UNDERSTANDING OF WHAT THE GOAL OF THE POLICY WAS TO BE?
A. YES.
Q. AND WHAT WAS THAT UNDERSTANDING?
A. WE -- THE WAY I UNDERSTOOD IT WAS THAT IT WAS AN ATTEMPT TO INTERVENE ON BEHALF OF THE UNBORN CHILDREN AND OFFER THE MOTHERS SOME SUBSTANCE ABUSE COUNSELING OR SOMETHING ELSE IN AN EFFORT TO KEEP THEM OFF OF CRACK COCAINE, BECAUSE I BELIEVE THAT IT WAS BECOMING A PROBLEM AT THE MEDICAL UNIVERSITY THE

NUMBER OF BABIES WHO WERE BORN WITH HEALTH PROBLEMS AS A RESULT OF THEIR MOTHERS INGESTING DRUGS WHILE THEY WERE PREGNANT.

Q. WAS IT YOUR UNDERSTANDING THIS WAS TO BE A

[CORNELY 322]

MULTIDISCIPLINARY APPROACH?

A. YES, MA'AM.

Q. CAN YOU EXPLAIN WHAT MULTIDISCIPLINARY APPROACH MEANS?

A. WELL DIFFERENT AGENCIES, A NUMBER OF DIFFERENT AGENCIES I BELIEVE THE CITY OF CHARLESTON WAS INVOLVED DSS WAS INVOLVED, THE SOLICITOR'S OFFICE WAS INVOLVED, SOME REPRESENTATIVES OF THE MEDICAL UNIVERSITY WERE INVOLVED SO THAT IS WHY IT WAS CALLED MULTIDISCIPLINARY.

Q. AND IN YOUR POSITION IN THE SOLICITOR'S OFFICE HAD YOU EVER BEEN INVOLVED -- WITH YOUR POSITION IN THE SOLICITOR'S OFFICE AS PROSECUTOR FOR CHILD -- EXCUSE ME, FOR CHILD ABUSE AND NEGLECT CASES, HAD YOU EVER BEEN INVOLVED IN ANY OTHER MULTIDISCIPLINARY FORCES ADDRESSING CHILD ABUSE?

MS. DUNN: OBJECTION, YOUR HONOR, I DON'T KNOW WHAT THAT'S RELEVANT TO, AND CERTAINLY BEYOND THE SCOPE.

THE COURT: GO AHEAD. IT.

Q. (BY MS. COMPANION, CONTINUING) DID YOU DO THIS WITH ANY OTHER HOSPITAL OR ANY OTHER AGENCY?
A. YES, I WAS.
Q. AND CAN YOU EXPLAIN THAT TO ME, PLEASE.
A. JUST PRIOR TO LEAVING THE SOLICITOR'S OFFICE I WAS INVOLVED IN A TASK FORCE TO ESTABLISH A MULTIDISCIPLINARY APPROACH TO THE PROSECUTION OF CHILD ABUSE AND NEGLECT CASES. I WENT WITH A NUMBER OF DIFFERENT PEOPLE TO ALABAMA TO VIEW A FACILITY THEY HAD THERE. AND AFTERWARD WE ESTABLISHED THE LAW.

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EXCERPTS FROM TESTIMONY OF ROGER NEWMAN, M.D.

[NEWMAN 180]

Q. AND THE QUESTIONS WERE CONCERNING THE INTERAGENCY POLICY WE HAVE COME TO KNOW AS M-7?
A. YES, SIR.
Q. NOW, DOCTOR, ONE OF THE CONCERNS THAT WERE EXPRESSED AND THAT YOU DEALT WITH IN THIS MEMO, WAS A PERCEPTION THAT THE POLICY, A, WAS PUNITIVE, FAIR?
A. COULD YOU DIRECT ME TO THE POINT IN THE LETTER THAT YOU'RE REFERRING TO? JUST TO SAVE ME TIME FROM READING IT ALL OVER AGAIN.
Q. I WILL TRY. YES, I CAN. IF YOU WILL GO TO PAGE 3 OF THE LETTER THE LAST PARAGRAPH I BELIEVE ON PAGE 3. YOU TALK ABOUT THE GOALS OF THE DEPARTMENT; IS THAT CORRECT?
A. YES, SIR.
Q. AND THE GOALS OF THE DEPARTMENT BEING NOT ONLY THE UNIVERSITY GOALS, THE OBSTETRICAL AND GYNECOLOGICAL GOALS I'M COMING TO THE PUNITIVE PART, BUT THEY'RE JOINT GOALS WITH THE POLICE DEPARTMENT AND SOLICITOR'S OFFICE, DON'T YOU?
A. YES, SIR.'
Q. SO YOU WERE EXPLAINING TO THE RESIDENTS THAT THIS WAS A UNIFIED PROGRAM, IT WAS A PROGRAM THAT RESULTED FROM

AGREEMENT OF THREE ENTITIES, IF YOU WILL? THE HOSPITAL?
THE COURT: I THINK THE-LETTER SPEAKS FOR ITSELF
THINK YOU'RE ARGUING THE LETTER. THE LETTER SPEAKS FOR
ITSELF. AND WHAT IT SAYS TO THE RESIDENTS IT SAYS TO THE
RESIDENTS. YOU WANT TO PUBLISH IT, YOU CAN PUBLISH IT

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[NEWMAN 220]

A. NO. NO, SIR AS I SAID, WE SPECIFICALLY PUT THE LIST OF
INDICATORS TOGETHER AND INSISTED THAT LIST OF INDICATORS BE
PART OF THE POLICY TO INSURE THAT PEOPLE WERE TESTED FOR
MEDICAL INDICATIONS AND NOT FOR OTHER EXTRANEOUS INDICATIONS.
Q. NOW I HAVE GOT A BLOWUP OF THE MEDICAL INDICATIONS, I
THINK IT'S AN EXHIBIT, LETTER FORM, THAT I WOULD LIKE TO GO
OVER WITH YOU.
THE COURT: SHOW IT TO COUNSEL..
MR. WHERRY: I HAVE SEEN IT, JUDGE.
Q. (BY MR. HOOD, CONTINUING) DOCTOR, COME DOWN AND STAND ON
THIS SIDE OF THIS POSTER FOR ME, PLEASE. MAYBE THIS WILL HELP
SO THE LAST JURY CAN SEE.
A. WELL THE INDICATIONS THAT WE USED, THESE ARE THE
INDICATIONS THAT WERE DEVELOPED FOR THE POLICY THE M-7

POLICY. THE INDICATION THAT WERE USED PRIOR TO THE M-7 POLICY BASICALLY ARE THESE ONES LISTED UNDER "A" WHICH WERE THE OBSTETRICAL INDICATORS. AND THEN FOR THE PURPOSES OF THE POLICY WE ADDED THESE DOWN HERE WHICH WERE THE INVOLVEMENT OF THE PEDIATRICIANS AND NEONATOLOGISTS.

THE PATIENTS THAT WE FELT REQUIRED SCREENING WOULD BE THE PATIENTS THAT PRESENTED FOR LABOR -- IN LABOR OR TO OUR DELIVERY SUITE WHO DID NOT AVAIL THEMSELVESTO ANY PRENATAL CARE AT ANY POINT DURING THAT PREGNANCY.

THEN THESE TWO HERE WOULD REALLY BE SOMEWHAT ANALOGOUS TO THAT. THESE WERE PATIENTS WHO EITHER HAD WHAT IS

[NEWMAN 221]

CALLED LATE PRENATAL CARE, WHICH FOR OUR PURPOSES WERE WOMEN WHO DID NOT COME FOR PRENATAL CARE UNTIL AFTER 24 WEEKS OF GESTATION, SO THIS IS REALLY THE LAST THIRD OF THEIR PREGNANCY, AND THEN PATIENTS WHO HAD INCOMPLETE PRENATAL CARE. AND WE-USED THE CRITERIA OF PATIENTS WHO MAY HAVE COME FOR PRENATAL CARE EARLY BUT THAT HAD HAD LESS THAN SIX PRENATAL CARE VISITS.

Q. LET ME STOP YOU. US MEN SOMETIMES DON'T UNDERSTAND

THIS. HOW MANY WEEKS IS NORMAL PREGNANCY?
A. PREGNANCY LASTS 42 WEEKS. TYPICALLY DIVIDED INTO TRIMESTERS, FIRST, SECOND, THIRD. FIRST WOULD BE UP TO 13 WEEKS AND SECOND UP TO 26 WEEKS, AND THE THIRD TRIMESTER WAS DELIVERY.
Q. AND WHEN IS A CHILD CONSIDERED VIABLE AS TO THE FETUS?
A. FOR THE PURPOSES OF THIS POLICY WE USED 27 WEEKS. BABIES ARE CERTAINLY VIABLE AS EARLY AS 26 AND SOMETIMES 25 WEEKS, ALTHOUGH AT THAT POINT IT'S MUCH MORE RISKY TO BE BORN AND MOST OF THOSE BABIES WILL PROBABLY DIE AT 24 TO 25 WEEKS. BUT BY 27 WEEKS THERE IS AN EXCELLENT CHANCE OF SURVIVAL. I THINK THE MEDICAL UNIVERSITY HAS ABOUT 80 PLUS OR 80 PERCENT FOR SURVIVAL AT 27 WEEKS, WHICH WOULD BE ROUGHLY A LITTLE OVER TWO POUNDS.
Q. TWO POUNDS?
A. YES.
Q. THE FOURTH INDICATION IS PROBABLY THE MOST COMMON

[NEWMAN 222]

COMPLICATION OF COCAINE ABUSE IN PREGNANCY, WHICH IS ABRUPTIO PLACENTA. THE PLACENTA IS AN ORGAN THAT PROVIDES THE EXCHANGE OF OXYGEN AND NUTRIENTS FOR THE BABY AND THE MOM. AND UNDER

THE INFLUENCE OF COCAINE, FOR INSTANCE, THAT CAUSES AN INTENSE HYPERTENSIVE EPISODE IN THE USE OF COCAINE. BLOOD PRESSURE GOES UP DRAMATICALLY WHEN YOU TAKE COCAINE. AND THAT BLOOD PRESSURE CAN CAUSE A SEPARATION FROM THE PLACENTA, FROM THE UTERUS. BLEEDING BEGINS AND AS THE BLEEDING CONTINUES IT FORMS A CLOT THAT JUST GRADUALLY SEPARATES THE PLACENTA. SOMETIMES IT CAN BE SMALL AND THE BABY WILL SURVIVE IT AND THEN USUALLY IF THE ABRUPTION INVOLVES HALF OF THE PLACENTA OR MORE, IT WILL BE FATAL.

Q. IS THAT A MEDICAL CRISES?

A. OH, YES. I MEAN, AGAIN HALF THE TIME OR MORE IT CAN BE FATAL TO THE INFANT, THAT IS SEVERE ABRUPTION. AND IT'S ASSOCIATED WITH HEMORRHAGE AND SHOCK AND COAGULATING PROBLEMS IN THE MOTHER. SO, IT'S POTENTIALLY LIFE-THREATENING TO THE MOTHER AS WELL.

Q. AND CAN THAT BE CAUSED BY ONE USE OF COCAINE DURING PREGNANCY?

A. YES. YES. IT DOESN'T RELATE TO CHRONIC OR HOW MUCH YOU USED IT OR HOW YOU TOOK IT, IT'S AN INDIVIDUAL RESPONSE THAT CAN BE CAUSED BY A SINGLE USE OF COCAINE.

Q. LET'S TALK ABOUT COCAINE FOR A MINUTE. FOR A CHILD IN UTERO, WHEN THE MOTHER INGESTED IT, WHAT DOES THAT DO TO THE

[NEWMAN 223]

LIFE SUPPORT FOR THAT BABY?
A. WELL, THE DRUG IS -- CAUSES CONSTRICTION OF BLOOD VESSELS. IT'S A VASAL CONSTRICTOR. WHEN YOUR BLOOD VESSEL CONSTRICTS YOUR BLOOD PRESSURE GOES UP, SO TWO THINGS ARE HAPPENING TO THE FETUS. FIRST OF ALL THE BLOOD SUPPLY TO THE PLACENTA AND TO THE BABY IS GOING TO BE REDUCED BECAUSE OF THE CONSTRICTION OF THE BLOOD VESSELS. ONE OF THE OTHER THINGS THAT IS ASSOCIATED WITH COCAINE USED IN PREGNANCY IS GROWTH RETARDATION, WHICH IS MORE OF A CHRONIC EFFECT, IT'S A BABY THAT HAS HAD RESTRICTIONS TO ITS BLOOD SUPPLY ON MULTIPLE OCCASIONS THROUGHOUT THE PREGNANCY.
Q. AND IF THAT HAPPENS WHEN THE CHILD'S ARM IS DEVELOPING OR HAND IS DEVELOPING, THE MOTHER USES COCAINE, WHAT CAN HAPPEN TO THE ARM?
MR. WHERRY: OBJECTION TO THE LEADING NATURE OF THE QUESTION.
Q. (BY MR. HOOD, CONTINUING) WHAT CAN HAPPEN TO THE ARM OR THE HAND?
A. WELL, IT'S REPORTED BY SOME INVESTIGATORS THAT CONGENITAL ANOMALIES CAN BE ASSOCIATED WITH COCAINE INGESTION. AND THE PROPOSED MECHANISM IS AT THE TIME OF FETAL DEVELOPMENT, THE

FIRST 13 -- 12 OR 13 WEEKS OF PREGNANCY, IF AT THAT TIME THERE IS INTERRUPTION OF THE OXYGEN SUPPLY, IT INTERFERES WITH THE DEVELOPMENT OF THAT PARTICULAR ORGAN SYSTEM. AND THE EXAMPLE WAS AN ARM OR A LEG, BUT THERE ARE MANY -- IT COULD HAPPEN TO

[NEWMAN 224]

ANY ORGAN SYSTEM.
AND PROBABLY THE ONE THAT I HAVE SEEN MOST FREQUENTLY RELATED TO COCAINE USE IS A DISRUPTION OF THE URINARY TRACT. THE DEVELOPMENT OF THE URINARY TRACT. SO THAT BLOCKAGE TO ESCAPE URINE AND WHATEVER ABNORMALITIES AND HOW THE KIDNEYS DEVELOP. SO, GOING BACK TO, THE QUESTION WAS, THE TWO EFFECTS THAT COCAINE HAS ON PREGNANCY IS TO CONSTRICT THE BLOOD VESSELS AND REDUCE SUPPLY OF OXYGEN AND NUTRIENTS TO THE BABY.

AND ALSO SECONDARY TO THAT, BLOOD PRESSURE GOES UP, AND THE PLACENTA IS REALLY A HUGE VASCULAR ORGAN, IT'S AN INTERMINGLING OF SMALL BLOOD VESSELS BETWEEN THE MOTHER AND BABY'S CIRCULATION. THE BLOOD DOESN'T ACTUALLY CROSS, BUT THE BABY'S VESSELS ARE VERY THIN WALLS, AND BLOOD AND OXYGEN AND NUTRIENTS AND THINGS DIFFUSE CIRCULATION BY THE MOTHER. IF

ONE OF THOSE SMALL VESSELS RUPTURES AND BLEEDING OCCURS, THAT CLOT, THAT BLEEDING WILL DISRUPT OTHER VESSELS AND CAUSE MORE BLEEDING AND LEAD TO THE PLACENTAE ABRUPTION THAT I MENTIONED EARLIER.

Q. OTHER CRITERIA UNDER THE POLICY WHICH WOULD MEAN THE MOTHER WOULD GET TESTED.

A. INTRAUTERINE FETAL DEATH OR STILLBIRTH, PREMATURE LABOR WHEN WE COULD FIND NO OTHER OBVIOUS CAUSE. FIRST INSTANCE, WOMEN WITH TWINS, HUGE RISK FACTOR. IF THAT PATIENT WOULD HAVE AN OBVIOUS CAUSE, URINARY TRACT INFECTION, IF THEY HAD

[NEWMAN 225]

BEEN IN A CAR ACCIDENT, THAT PATIENT WOULDN'T HAVE BEEN SCREENED...BUT SOMEBODY WHO HAD NO OTHER APPARENT REASON TO BE IN LABOR WOULD BE SOMEBODY THAT WE WOULD SCREEN. COCAINE HAS BEEN SHOWN TO STIMULATE UTERINE CONTRACTIONS, AND THE EXACT MECHANISM I DON'T THINK I CAN EXPLAIN.

Q. DEFINE THIS WORD PRE-TERM. PRE-TERM LABOR?

A. PRE-TERM LABOR IS ENTERING LABOR PRIOR TO 37 WEEKS GESTATION.. WE SAY-PREGNANCY LASTS 40 -- WOMEN ARE CONSIDERED TO BE AT TERM BETWEEN -- BETWEEN 37 AND 42 WEEKS. ANYTHING

LESS THAN 37 IS CONSIDERED PRE-TERM. OBVIOUSLY THE MORE PRE-TERM YOU ARE THE GREATER RISK OF BEING --

Q. IN OTHER WORDS, IF THE BABY COMES BEFORE IT WAS 37 WEEKS?

A. YES, SIR.

Q. WHAT ARE WE DEALING WITH MEDICALLY?

A. WELL, IT WOULD DEPEND ON THE TIME AND GESTATION. A BABY BORN AT 36 WEARS IS GOING TO DO VIRTUALLY AS WELL AS A BABY BORN AT TERM. THEY MAY HAVE A LITTLE JAUNDICE, THEY MAY HAVE A LITTLE FEEDING PROBLEM, DIFFICULTY WITH TEMPERATURE REGULATION, BUT THEY'RE NOT GOING TO HAVE MAJOR COMPLICATIONS A BABY BORN AT 24 WEEKS IS GOING TO DIE. MAYBE AFTER A LONG PERIOD OF TIME IN THE NURSERY, BUT IT'S VERY UNLIKELY TO SURVIVE. WE SEE MORE PRE-TERM LABOR IN WOMEN BETWEEN 29 AND 31 WEEKS. IF YOU GRAPHED IT OUT, THAT'S WHEN MOST PRE-TERM LABOR SEEMS TO OCCUR. AND A BABY THAT IS DELIVERED AT 30 WEEKS GESTATION HAS AN 85 PERCENT CHANCE OF

[NEWMAN 226]

SURVIVAL. BUT THE MAJORITY OF THOSE BABIES WOULD GO TO THE INTENSIVE CARE UNIT, THE MAJORITY WOULD PROBABLY REQUIRE BEING

ON A VENTILATOR FOR A VARIABLE PERIOD OF TIME. AND THEY WOULD BE AT RISK FOR OTHER COMPLICATIONS, WHICH ARE LESS FREQUENT BUT VERY SEVERE, SUCH AS INTRACRANIAL HEMORRHAGE, A BOWEL THAT BECOMES ISCHEMIC AND HAS TO BE REMOVED. INFECTION, JAUNDICE AND PROBLEMS SUCH AS THAT.

SO A BABY BORN AT 30 -WEEKS GESTATIONAL, A RULE OF THUMB THAT WE USE WHEN WE ADVISE MOMS IS THE BABY WILL PROBABLY STAY IN THE HOSPITAL AS LONG AS IT WOULD HAVE NEEDED TO STAY IN YOUR TUMMY BEFORE IT GOES HOME. SO 30-WEEK BABY YOU'RE LOOKING-AT PROBABLY SEVEN TO EIGHT-MONTHS --

MR. WHERRY: OBJECTION, YOUR HONOR, ON RELEVANCE. THIS HAS NOTHING TO DO WITH THE LAWSUIT. THE LAWSUIT HAS TO DEAL WITH THE POLICY. NOT WHETHER COCAINE IS GOOD FOR PREGNANT WOMEN TO USE OR NOT.

THE COURT: WHETHER COCAINE IS WHAT?

MR. WHERRY: GOOD FOR PREGNANT WOMEN TO USE OR NOT IT HAS TO DO WITH THE POLICY AND THE WAY THEY FRAMED IT RATHER THAN NARROWLY TAILORING IT. SO RATHER THAN GOING THROUGH ALL THE CRITERIA AND TELLING US ALL- THE THINGS THAT GO WRONG, THE ONLY PURPOSE IS 403 AND I SUGGEST THAT THIS JUST SIMPLY ISN'T RELEVANT.

THE COURT: I DON'T KNOW THAT IT'S APPROPRIATE OR NECESSARY TO GO DOWN THIS CHART WITH EACH WITNESS. BUT WE DO

[NEWMAN 227]

HAVE A NUMBER OF DEFENDANTS AND THEY ARE CHARGED WITH CERTAIN ACTS THAT ALLEGEDLY DAMAGED THE PLAINTIFFS.

MR. WHERRY: YES, SIR.

THE COURT: AND I THINK THEY HAVE A RIGHT TO EXPLAIN WHY THEY DID WHAT THEY DID, AND THAT INCLUDES EXPLAINING WHY THEY TOOK THEIR ACTIONS OR WHY THEY ACTED OR WHAT KNOWLEDGE THEY HAD OR WHAT THEY HAVE BEEN TOLD. BASICALLY TO PUT IT SHORT, WHAT WAS IN THEIR HEAD. AND SO I THINK HE HAS A RIGHT TO DO THAT. I THINK ALL OF THE DEFENDANTS HAVE THE RIGHT TO DO THAT. WHETHER I'LL PERMIT COUNSEL TO DO IT IN THE MANNER HE IS-DOING IT WITH ALL DEFENDANTS REMAINS TO BE SEEN. BUT, FOR THE TIME BEING, I THINK THE QUESTION WAS APPROPRIATE AND I OVERRULE YOUR OBJECTION.

Q. (BY MR. HOOD, CONTINUING) DR. NEWMAN, YOU TALKED ABOUT THE BABIES GOING TO THE NICU, WHICH IS BASICALLY THE INTENSIVE CARE UNIT FOR BABIES. AS Y'ALL WERE FORMULATING THESE CRITERIA TO DETERMINE WHETHER OR NOT TO TEST WOMEN, WOMENS'

URINE, WAS COST A CONSIDERATION? THE COST?

MR. WHERRY: OBJECTION. YOU ALREADY RULED ON THAT.

THE COURT: NO.

MR. WHERRY: MAY I BE HEARD AT SIDEBAR.

THE COURT: SIR?

MR. WHERRY: MAY I BE HEARD AT SIDEBAR.

THE COURT: ABSOLUTELY.

(SIDEBAR AS FOLLOWS:)

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EXCERPTS FROM TESTIMONY OF JOHN M. SANDERS

[SANDERS 102]

PATIENTS TAKING THEM OUT AND HOW THEY WERE HANDCUFFED. THAT WAS NOT UNDER OUR CONTROL.

Q. MR. SANDERS, I'M GOING TO SHOW YOU WHAT IS PLAINTIFFS, EXHIBIT 224, A COPY OF A -- A VERSION OF THE HOSPITAL POLICY THAT YOU IDENTIFIED AND AUTHENTICATED IN A DEPOSITION THAT IS NOW IN EVIDENCE. I WOULD LIKE TO ASK YOU TO PUBLISH A PORTION OF THAT, AND THAT WOULD BE THE PARAGRAPH UNDER THE WORDS POLICY?

A. PUBLISH MEAN READ IT?

Q. YES.

A. I'M SORRY.

MR. HOOD: CAN I SEE WHAT HE HAS GOT?

MS. PALTROW: YES, OF COURSE.

MR. HOOD: IS IT IN EVIDENCE?

MS. PALTROW: YES, IT IS.

Q. (BY MS. PALTROW, CONTINUING) IF YOU WOULD READ THAT PARAGRAPH, PLEASE.

A. "THE MUSC MEDICAL CENTER WILL COOPERATE WITH THE CITY OF CHARLESTON POLICE DEPARTMENT AND COURT OF LAW IN REPORTING PREGNANT WOMEN WHO HAVE TESTED POSITIVE FOR ILLEGAL DRUGS. THE FOLLOWING CRITERIA WILL BE USED TO DETERMINE WHO WILL BE SCREENED FOR URINE DRUG TESTING."

Q. SO IN FACT THE CITY OF CHARLESTON POLICE DEPARTMENT COULD

MAKE ARRESTS BECAUSE THE MEDICAL UNIVERSITY DECIDED TO
COOPERATE WITH THEM IN TERMS OF REPORTING COCAINE POSITIVE

[SANDERS 103]

WOMEN; ISN'T THAT CORRECT?
A. WE REPORTED POSITIVE DRUG TESTS IN REGARD TO THE
DISPOSITION OF THE BABY BECAUSE ALL HEALTH CARE PROVIDERS ARE
REQUIRED TO PROVIDE INFORMATION TO OUTSIDE AGENCIES IF THEY'RE
SUSPICIOUS OF CHILD ABUSE.
Q. YOU DIDN'T ANSWER MY QUESTION. ISN'T IT CORRECT THAT
THEY WERE ABLE TO MAKE THE ARRESTS BECAUSE YOU DECIDED TO
COOPERATE FOR WHATEVER REASON?
A. SURE WE COOPERATED, YES, MA'AM.
Q. AND ISN'T IT CORRECT, MR. SANDERS, THAT BEFORE THIS
POLICY WAS PUT INTO PLACE, THAT IF THERE WAS A POSITIVE DRUG
TEST ON A WOMAN ON A NEWBORN OR ALCOHOL TEST, THE HOSPITAL
POLICY WAS ONLY TO REPORT IT TO DSS?
A. THAT'S CORRECT.
Q. SO THIS WAS A CHANGE FROM THAT POLICY THAT EXISTED ALL OF
THE WAY UP UNTIL OCTOBER OF 1989; ISN'T THAT CORRECT?
A. YES, IT WAS.
Q. . AND THERE WAS NO CHANGE IN THE STATE LAW AS OF OCTOBER
1989 THAT ANYBODY TOLD YOU ABOUT; ISN'T THAT CORRECT?
A. NOT THAT I'M AWARE OF.

Q. SO THIS POLICY CHANGED -- THIS POLICY THAT MUSC ADOPTED WITH THE POLICE AND THE SOLICITOR'S OFFICE, CHANGED WHAT HAD BEEN HAPPENING FROM THE NORM BEFORE THE POLICY; ISN'T THAT CORRECT?

A. IT WAS A NEW POLICY, YES, MA'AM.

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EXCERPTS FROM TESTIMONY OF MARTIN SHAPIRO

[SHAPIRO 125]

DETERMINING HOW YOU MAKE YOUR STATISTICAL CONCLUSIONS. AND I THOUGHT THAT I KNEW THE NUMBERS,- BUT I THINK THEY SHOULD BE IN THE RECORD.

MR. HOOD: I WOULD LIKE THE COURT TO HAVE THE TABLE AS WE GO THROUGH THIS, BECAUSE I DON'T BELIEVE THAT THE NUMBER IS IN THE TABLE.

THE COURT: YOU'LL HAVE AN OPPORTUNITY TO CROSS-EXAMINE, MR. HOOD. THAT WILL BE THE APPROPRIATE TIME. IF YOU WANT TO GIVE ME SOMETHING TO LOOK AT I'LL BE HAPPY TO LOOK AT IT.

MR. HOOD: ALL RIGHT. I'LL OBJECT TO THE QUESTION NOW GETTING READY TO BE ASKED, IT'S NOT BASED UPON WHAT HE IS CLAIMING TO RELY HIS OPINION FROM.

THE COURT: I HAVEN'T HEARD THE QUESTION.

MR. HOOD: HE IS GIVEN YOU A NUMBER NOT SUPPORTED BY THE TABLE.

THE COURT: WELL THAT'S SOMETHING FOR TO YOU BRING OUT BY CROSS-EXAMINATION, NOT BY RANDOM ARGUMENT. YOU MAY PROCEED.

MR. WHERRY: THANK YOU, SIR.

Q. (BY MR. WHERRY, CONTINUING) JUST BY THE WAY, DOCTOR, THE

PRIOR OPINION THAT YOU GAVE US, DID YOU USE THE BINOMIAL DISTRIBUTION METHOD OF MAKING THE ANALYSIS THAT YOU MADE?

A. WELL, THAT PARTICULAR NUMBER IS JUST -- JUST THE NUMBERS FROM WHICH I WILL DO THE BINOMIAL ANALYSIS.

[SHAPIRO 126]

Q. OKAY.

A. BECAUSE IF YOU LOOK AT THE TOTAL NUMBER OF PEOPLE, THE TOTAL NUMBER OF WOMEN WHO TESTED EITHER POSITIVE OR NEGATIVE OR WHO WERE NOT TESTED, JUST THE TOTAL NUMBER OF MATERNITY CASES, IT WOULD BE IT WOULD BE 14,330, OF WHICH 67 PERCENT OF THEM ARE BLACK.

Q. DOCTOR, DID YOU COMPARE THE NUMBER OF MATERNITY PATIENTS WHO TESTED POSITIVE --

MR. HOOD: THE COURT PLEASE, THE LAST NUMBER, I HAVE NO IDEA WHERE IT CAME FROM.

THE COURT: I HAVE NO IDEA WHAT HE WAS SAYING BECAUSE I WASN'T PAYING ATTENTION.

MR. HOOD: I WOULD LIKE TO KNOW THE SOURCE OF THE NUMBER.

THE COURT: YOU'RE GOING TO HAVE AN OPPORTUNITY TO CROSS-EXAMINE HIM. YOU HAVE AN OPPORTUNITY TO TAKE HIS DEPOSITION.

Q. (BY MR. WHERRY, CONTINUING) DOCTOR, DID YOU COMPARE THE NUMBER OF WOMEN POS -- WHO TESTED POSITIVE FOR DRUGS AT MUSC DURING THE OPERATIVE TIME PERIOD, THAT'S '89 THROUGH '93 OR 4, TO THE MATERNITY POPULATION AS A WHOLE AT MUSC?

A. YES. IF I CAN JUST REPEAT IT, BECAUSE WE HAVE LOST THE CHAIN HERE. WITHIN THE DRUG POSITIVE WOMEN, 68 PERCENT OF THEM WERE BLACK. WITHIN THE ENTIRE MATERNITY POPULATION, 67 PERCENT ARE BLACK. THAT IS, WE'RE WITHIN 1 PERCENT.

[SHAPIRO 127]

OBVIOUSLY THERE IS NO STATISTICALLY SIGNIFICANT DIFFERENCE BETWEEN THOSE TWO GROUPS. THAT IS THE WOMEN WHO TESTED POSITIVE FOR DRUGS IN GENERAL COULD JUST AS WELL HAVE BEEN JUST A RANDOM SAMPLE FROM ALL OF THE MATERNITY PATIENTS BECAUSE THEY ARE PROPORTIONATELY WHITE AND BLACK.

MR. HOOD: MOVE TO STRIKE HIS TESTIMONY AS GOING BEYOND THE SCOPE OF THE QUESTION.

THE COURT: OVERRULED, GO AHEAD.

A. THEY ARE PROPORTIONATELY WHITE AND BLACK IN THE SAME PROPORTIONS, THE SAME RATIO, THE SAME RELATIONSHIP AS THE GENERAL MATERNITY POPULATION.

Q. THANK YOU.

DOCTOR, DID YOU PERFORM A COMPARISON, RACIALLY -- OR BY RACE, OF THOSE MATERNITY PATIENTS WHO TESTED POSITIVE FOR COCAINE AS OPPOSED TO THE MATERNITY PATIENTS AS A WHOLE AT MUSC DURING THE OPERATIVE TIME PERIOD?

A. YES.

MR. HOOD: A CONTINUING OBJECTION ON THE GROUND STATED, PLEASE.

THE COURT: YES, SIR.

Q. (BY MR. WHERRY, CONTINUING) DOCTOR, WOULD YOU ADVISE THE JURY OF WHAT THAT COMPARISON IS?

A. YES. THERE WERE 134 WOMEN TOTAL WHO TESTED POSITIVE FOR COCAINE. OF THOSE 134, 133 ARE RACIALLY IDENTIFIABLE. AGAIN THERE IS ONE PERSON WHO IS NOT. OF THOSE 133, 120 WERE BLACK

[SHAPIRO 128]

AND 13 WERE WHITE. THAT IS, LOOKING AT JUST THE WOMEN WHO TESTED POSITIVE FOR COCAINE, 90 PERCENT OF THEM WERE BLACK.

THE COURT: DOES THAT MEAN 10 PERCENT WERE WHITE?

THE WITNESS: THAT'S CORRECT. AND THE ONE STRAY PERSON, BUT THE NUMBERS ARE LARGE ENOUGH THAT IT DOESN'T REALLY AFFECT THE PERCENTAGE.

(BY MR. WHERRY, CONTINUING) WERE YOU ABLE TO FORM AN OPINION, TO A REASONABLE DEGREE OF STATISTICAL PROBABILITY, AS

TO THE EXISTENCE OR NONEXISTENCE OF THE STATISTICALLY SIGNIFICANT IMPACT OF THESE COMPARISONS THAT YOU HAVE JUST MADE ON ANY GROUP OF WOMEN OR MATERNITY PATIENTS?

A. YES. IF YOU USE THE BINOMIAL DISTRIBUTION, AND YOU USE THE UNDERLYING PERCENT BLACK, AS LET'S SAY .68 YOU COULD USE .67. I MEAN, IT DOESN'T MATTER WHICH GROUP YOU COMPARE IT TO, ALL OF THE MATERNITIES OR THE DRUG POSITIVE MATERNITIES, BECAUSE IT'S ESSENTIALLY THE SAME. IF YOU USE THAT NUMBER AND DO THE BINOMIAL DISTRIBUTION, LOOKING AT THE FACT THAT THERE ARE 133 RACIALLY IDENTIFIABLE WOMEN, YOU GET A RESULT THAT IS DIFFERENT FROM WHAT YOU EXPECT. THAT IS, YOU GET A DIFFERENCE BETWEEN 68 PERCENT AND 90 PERCENT, WHICH IS 22 PERCENT. WHICH BY THE STATISTICAL TEST TELLS YOU THAT IT IS 5.44 STANDARD DEVIATIONS FROM WHAT YOU WOULD EXPECT BY CHANCE. AND IF I CAN TRANSLATE THAT

Q. WELL, LET ME STOP YOU. I'M GOING TO ASK YOU TO. BUT BEFORE YOU TRANSLATE THAT, WOULD YOU TRANSLATE BINOMIAL

[SHAPIRO 129]

DISTRIBUTION FOR US?

A. YES. BINOMIAL DISTRIBUTION IS REALLY VERY SIMPLE. IT'S

JUST FLIPPING A COIN. IN THIS INSTANCE AND WE HAVE GOT A COIN THAT IS HEAVIER ON THE BLACK SIDE THAN IT IS ON THE WHITE SIDE. THAT IS, WE'RE STARTING WITH A' COIN THAT IS TWO-THIRDS BLACK, BECAUSE THAT'S THE PERCENTAGE OF BLACK AND WHITE IN THE MATERNITY GROUP. TWO OUT OF EVERY THREE MATERNITY PATIENTS IS BLACK, SO WE HAVE GOT A COIN THAT IS GOING TO TURN UP TWO OUT OF EVERY THREE TIMES BLACK. WE FLIP THIS COIN AND WE DO IT A 133 TIMES, BECAUSE THAT'S HOW MANY COCAINE POSITIVE WOMEN WE'RE LOOKING AT. WE FLIP THIS COIN 133 TIMES AND IF THE COIN WERE DOING WHAT WE WOULD EXPECT IT TO DO, TWO-THIRDS WHITE –

I'M SORRY. EXCUSE ME. TWO-THIRDS BLACK, ONE-THIRD WHITE, WE WOULD EXPECT THAT WE WOULD FIND THAT THERE WERE 89 BLACK WOMEN. AND THE OTHER TIMES, 44 TIMES THE COIN CAME UP WHITE. THAT'S WHAT WE WOULD EXPECT. EIGHTY-NINE BLACK TOSSES, 44 WHITE TOSSES.

Q. AND THAT'S BINOMIAL DISTRIBUTION?

A. THAT'S WHAT THE BINOMIAL DISTRIBUTION WOULD TELL US. BUT THAT IN FACT WHAT HAPPENED –

WHAT HAPPENED?

A. THIS SOUNDS DRAMATIC. WE DIDN'T GET 89 AND 44, WE GOT 120 AND 13.

Q. AND YOU HAVE INDICATED THAT WAS EQUAL TO A STANDARD –

MR. HOOD: COURT PLEASE, HE IS LEADING.

[SHAPIRO 130]

MR. WHERRY: JUDGE, IT'S PRELIMINARY.
THE COURT: YOU STILL CAN'T LEAD HIM. YOU HAVE INDICATED THAT WAS WHAT WHATEVER.
Q. (BY MR. WHERRY, CONTINUING) WHAT WAS THE STANDARD DEVIATION?
A. IT WAS 5.44 STANDARD DEVIATION. ACTUALLY 5.4390.
Q. WHAT IS A STANDARD DEVIATION?
A. A STANDARD DEVIATION IS A MEASURE OF VARIABILITY. THAT IS, IT'S A MEASURE OF HOW MUCH FLUCTUATION YOU WOULD EXPECT BY CHANCE.
NOW, AS I SAID, YOU WOULD EXPECT 89 BLACK COCAINE POSITIVES AND 44 WHITE COCAINE POSITIVES. BUT AS WE ALL KNOW, YOU WOULDN'T GET EXACTLY 89 AND EXACTLY 44. I MEAN, MAYBE YOU WOULD HAVE 90 OR 85 OR WHAT HAVE YOU. SO THE QUESTION IS: HOW DIFFERENT IS THE OBSERVED 120 FROM WHAT YOU WOULD HAVE EXPECTED, 89. AND THE WAY WE MEASURE THAT DIFFERENCE IS NOT JUST IN THE NUMBER OR INCHES OR SOME OTHER MEASURE, WE HAVE THIS MEASURING STICK WE CALL STANDARD DEVIATION. I COULD EXPLAIN WHY WE HAVE THAT MEASURING STICK, BUT SOMETHING TELLS ME IT'S MORE BORING THAN USEFUL.
Q. IT WOULD BE BORING TO ME.

A. AND WHAT WE FIND HERE IS THAT WE'RE -- WE'RE ALMOST FIVE AND A HALF UNITS, FIVE AND A HALF STANDARD DEVIATIONS OFF OF WHAT WE WOULD HAVE EXPECTED. NOW, YOU CAN CONVERT THAT INTO PROBABILITY TERMS.

[SHAPIRO 131]

DOING PROBABILITIES, THE PROBABILITY OF BY CHANCE BEING FIVE AND A HALF STANDARD DEVIATIONS DIFFERENT THAN WHAT YOU WOULD EXPECT BY CHANCE WITH THE BINOMIAL DISTRIBUTION, THE PROBABILITY IS ABOUT ONE IN A HUNDRED THOUSAND. ALMOST ONE IN A MILLION THAT BY CHANCE YOU WOULD MISS IT BY THAT MUCH.

Q. BY HOW MUCH?

A. BY THE DIFFERENCE BETWEEN 89 AND 120. THAT IS, THAT YOU WOULD HAVE BEEN OFF BY 31 PEOPLE. THE PROBABILITY OF THAT HAPPENING PURELY BY CHANCE IS VERY SMALL. IT'S SOMETHING THAT I'M ESTIMATING BETWEEN ONE IN A HUNDRED THOUSAND, ONE IN A MILLION.

Q. MOVING ON, DID YOU, SIR, COMPARE THE RACIAL COMPOSITION OF WOMEN ARRESTED PURSUANT TO THE INTERAGENCY POLICY WITH THE RACIAL COMPOSITION OF THE MATERNITY POPULATION IN THE HOSPITAL AS A WHOLE STATISTICALLY?

A. YES.

MR. HOOD: COURT PLEASE, THERE IS NO FOUNDATION FOR THAT QUESTION. OBJECT TO THAT.

THE COURT: I'M NOT SURE EXACTLY WHAT YOU MEAN BY FOUNDATION. THE STATISTICS THAT WE DISCUSSED AT THE BREAK?

MR. HOOD: YES, SIR. HE IS TALKING ABOUT ARRESTS NOW.

THE COURT: I UNDERSTAND.

MR. HOOD: IT HAS NOTHING TO DO WITH ARRESTS, THE STATISTICS THAT WE TALKED ABOUT AT THE BREAK.

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[SHAPIRO 139]

MR. HOOD: YOU WANT ME TO DO IT?

THE COURT: I WANT HIM TO DO IT. YOU CAN ASK HIM WHATEVER QUESTION YOU WANT.

VOIR DIRE EXAMINATION

BY MR. WHERRY:

Q. DID YOU, SIR, COMPARE THE RACIAL COMPOSITION OF THE WOMEN ARRESTED PURSUANT TO THE INTERAGENCY POLICY AND THE OPERATIVE TIME PERIOD WITH THE RACIAL COMPOSITION OF THE MATERNITY POPULATION OF THE HOSPITAL AS A WHOLE?

A. YES.

Q. AND WHAT DID THAT COMPARISON DISCLOSE?

A. THAT THE WOMEN ARRESTED WERE SIGNIFICANTLY MORE BLACK IN PROPORTION THAN THE MATERNITY PATIENTS IN THE HOSPITAL.

Q. WHAT WERE THE PERCENTAGES?

A. THERE WERE 30 WOMEN. OF THOSE 30, 28 WERE BLACK. OF THOSE 30, 28 WERE BLACK. HOWEVER, OF THE -- OF THE TWO WOMEN THAT WERE NOT BLACK, THE NOTES WHICH I READ MYSELF, THE NOTES OF NURSE SHIRLEY BROWN, NOTED THAT THE PATIENTS, I THINK I'M SAYING THIS RIGHT, YES, THE PATIENTS LIVED WITH A BOYFRIEND.

THE COURT: I'M FAMILIAR WITH THAT.

THE WITNESS: OKAY. SO IF YOU COUNT IN TERMS OF THE RACE OF THE BABY, IT'S ACTUALLY -- THE BABIES OF THE WOMEN, IT'S ACTUALLY 30 OUT OF 30. IF YOU COUNT JUST THE RACE OF THE WOMEN, IT'S 28 OUT OF 30, WHICH WOULD BE 93 PERCENT.

Q. AS COMPARED TO?

[SHAPIRO 140]

A. 67 PERCENT.

Q. WHICH IS THE PERCENTAGE OF BLACK WOMEN WHO WERE IN THE BLACK MATERNITY PATIENTS AT MUSC DURING THE OPERATIVE TIME PERIOD?

A. THAT'S CORRECT.

Q. DOCTOR, IN YOUR OPINION IS THAT A STATISTICALLY SIGNIFICANT DIFFERENCE?

A. YES. IF YOU TAKE .67 AS YOUR UNDERLYING PROBABILITY, AND YOU WERE ASKED WHAT IS THE PROBABILITY OF GETTING 30 IN A ROW WHO ARE BLACK OR BABIES ARE BLACK, THE PROBABILITY IS POINT

ZERO AND FIVE ZEROS. .00006 THAT THAT RESULT WOULD HAPPEN BY CHANCE. THAT WOULD CORRESPOND TO, AGAIN, ABOUT FIVE STANDARD DEVIATIONS.

Q. AND TRANSLATING THAT STANDARD DEVIATION, THE CHANCE OF THAT HAPPENING IS ONE IN HOW MANY?-

A. WELL, AS I SAID, IT WOULD BE ABOUT ABOVE FIVE SERIES, IT'S ONE IN A 165,103 TO BE EXACT.

Q. DID YOU COMPARE, DOCTOR, THE NUMBER OF WHITE AND NON-WHITE DELIVERING MOTHERS TESTED FOR DRUGS DURING THREE DIFFERENT TIME PERIODS?

A. YES.

Q. TIME PERIOD. NUMBER ONE WAS WHAT TIME PERIOD? OR TIME PERIOD A OR THE FIRST TIME PERIOD?

A. OCTOBER 1, 1988, TO MARCH 31, 1989.

Q. AND SECOND TIME PERIOD?

[SHAPIRO 141]

A. APRIL 1, 1989, TO SEPTEMBER 30, 1989.

Q. AND THE THIRD TIME PERIOD?

A. OCTOBER 1, 1989, TO DECEMBER 31, 1992.

Q. WHAT WAS THE RESULT THAT YOU ARRIVED AT DURING THOSE COMPARISONS?

A. THE RESULT IS THAT IF YOU LOOK AT EITHER OF THE TWO EARLIER TIME PERIODS, EITHER THE ONE LEADING UP TO THE END OF MARCH OF 1989, OR THE PERIOD FROM APRIL THROUGH SEPTEMBER OF 1989, THAT THE PROPORTION OF WHITE AND BLACK, WHEN TESTED,

MATCHES THE PROPORTION OF BLACK AND WHITE WITHIN THE MATERNITY POPULATION.

IF YOU LOOK AT THE TIME PERIOD AFTER OCTOBER 1, 1989, THROUGH DECEMBER 31, 1989, (SIC) THAT PROPORTION OF WOMEN TESTED IS -- IS STATISTICALLY SIGNIFICANTLY MORE, I'LL SAY BLACK, TO USE A EUPHEMISM -- IS MORE BLACK THAN A MATERNITY POPULATION IN GENERAL.

Q. AND USING THE BINOMIAL DISTRIBUTION METHOD OF STATISTICS, DID YOU ARRIVE AT A STANDARD DEVIATION FOR THAT STATISTICALLY SIGNIFICANT DIFFERENCE? HAVE I WORDED THAT QUESTION CORRECTLY?

A. YES. IT IS APPROXIMATELY 10 AND A HALF STANDARD DEVIATIONS.

Q. WHAT DOES THAT TRANSLATE TO FOR 10 AND A HALF STANDARD DEVIATIONS?

A. OH, I DON'T KNOW. IT'S TOO BIG A NUMBER TO COME UP WITH

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EXCERPTS FROM TESTIMONY OF MARTHA J. COOPER WILLIAMS

[WILLIAMS 127]

A. WELL, AT THIS POINT IT WAS THE DIVISION OF SOCIAL WORK.
THE DIVISION OF SOCIAL WORK WHERE?
A. AT MUSC.
Q. OKAY.
A. AND CERTAIN MEMBERS OF A COMMITTEE OVER AT THE SUBSTANCE ABUSE COMMISSION.
Q. THE CHARLESTON COUNTY?
A. HERE IN CHARLESTON, YES.
Q. THAT'S THE "WE" THAT YOU'RE TALKING ABOUT?
A. YES. WE HAD BEEN TALKING ABOUT PROVIDING SPACES AT MUSC IN ORDER TO DO THE ASSESSMENTS, THE REFERRALS, ETCETERA, OF THOSE WOMEN WHO WERE FOUND OR WHOSE BABIES WERE FOUND TO BE COCAINE POSITIVE. AND IT WASN'T JUST COCAINE.
IF IT WASN'T JUST COCAINE?
WE WEREN'T FOCUSING ON JUST COCAINE, NO. WE WERE LOOKING AT ANY KIND OF SUBSTANCE ABUSE ISSUE THAT MIGHT ARISE, BE IT ALCOHOL ABUSE, AND OTHER TYPES OF DRUG ABUSE.
Q. DID THE REFERRAL PROCESS THAT YOU ARE TALKING ABOUT NOW INVOLVE ANY ARRESTS IN THAT PROCESS?
A. CERTAINLY NOT. IF I MAY, ONE OF THE THINGS IN THE AREA OF SUBSTANCE ABUSE AS A RULE, CRIMINALIZATION IS THE VERY LAST

RESORT AND IS ONLY RECOMMENDED BY TREATMENT EXPERTS.

MS. SHOWERS: I'LL OBJECT FOR LACK OF FOUNDATION FOR THIS WITNESS TO GIVE OPINION TESTIMONY. SHE IS NOT LISTED AS AN EXPERT.

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